

LIBRARY OF CONGRESS

UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

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IN THE MATTER OF:)

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DETERMINATION OF RATES) Docket No.

AND TERMS FOR MAKING AND) 16-CRB-0003-PR

DISTRIBUTING PHONORECORDS) (2018-2022)

(PHONORECORDS III),)

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CONDENSED TRANSCRIPT WITH KEYWORD INDEX

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<p style="text-align: right;">5203</p> <p>1 UNITED STATES COPYRIGHT ROYALTY JUDGES 2 The Library of Congress 3 -----X 4 IN THE MATTER OF:) 5) 6 DETERMINATION OF RATES) Docket No. 7 AND TERMS FOR MAKING AND) 16-CRB-0003-PR 8 DISTRIBUTING PHONORECORDS) (2018-2022) 9 (PHONORECORDS III),) 10 -----X 11 BEFORE: THE HONORABLE SUZANNE BARNETT 12 THE HONORABLE JESSE M. FEDER 13 THE HONORABLE DAVID R. STRICKLER 14 Copyright Royalty Judges 15 16 Library of Congress 17 Madison Building 18 101 Independence Avenue, S.E. 19 Washington, D.C. 20 21 April 6, 2017 22 9:22 a.m. 23 VOLUME XVIII 24 Reported by: 25 Karen Brynteson, RMR, CRR, FAPR</p>	<p style="text-align: right;">5205</p> <p>1 APPEARANCES (Continued): 2 Counsel for Pandora Media, Inc.: 3 PETER D. ISAKOFF, ESQ. 4 Weil Gotshal & Manges, LLP 5 1900 Eye Street, N.W. 6 Suite 900 7 Washington, D.C. 20005 8 202-882-7155 9 10 BENJAMIN E. MARKS, ESQ. 11 JENNIFER RAMOS, ESQ. 12 JACOB B. EBIN, ESQ. 13 Weil, Gotshal & Manges, LLP 14 767 Fifth Avenue 15 New York, New York 10153-0119 16 212-310-8029 17 18 DAVID SINGH, ESQ. 19 HONG-AN TRAN, ESQ. 20 Weil, Gotshal & Manges LLP 21 201 Redwood Shores Parkway 22 Redwood Shores, CA 94065 23 650-802-3000 24 25</p>
<p style="text-align: right;">5204</p> <p>1 A P P E A R A N C E S: 2 Counsel for National Music Publishers Association, 3 Nashville Songwriters Association International: 4 DONALD ZAKARIN, ESQ. 5 BENJAMIN K. SEMEL, ESQ. 6 FRANK SCIBILIA, ESQ. 7 LISA M. BUCKLEY, ESQ. 8 JAMES A. JANOWITZ, ESQ. 9 JOSH WEIGENSBERG, ESQ. 10 MARION HARRIS, ESQ. 11 WILLIAM L. CHARRON, ESQ. 12 ALEX GOLDBERG, ESQ. 13 Pryor Cashman, LLP 14 Seven Times Square 15 New York, New York 10036 16 212-421-4100 17 18 Counsel for Apple Music, Inc.: 19 MARY MAZZELLO, ESQ. 20 Kirkland & Ellis, LLP 21 601 Lexington Avenue 22 New York, New York 10022 23 24 25</p>	<p style="text-align: right;">5206</p> <p>1 APPEARANCES (Continued): 2 Counsel for Spotify USA, Inc.: 3 A. JOHN P. MANCINI, ESQ. 4 XIYIN TANG, ESQ. 5 Mayer Brown LLP 6 1221 Avenue of the Americas 7 New York, New York 10020 8 212-506-2295 9 10 RICHARD M. ASSMUS, ESQ. 11 KRISTINE M. YOUNG, ESQ. 12 Mayer Brown LLP 13 71 S. Wacker Drive 14 Chicago, Illinois 60606 15 312-782-0600 16 17 PETER O. SCHMIDT, ESQ. 18 ANITA Y. LAM, ESQ. 19 Mayer Brown LLP 20 1999 K Street, N.W. 21 Washington, D.C. 20006 22 202-263-3000 23 24 25</p>

<p style="text-align: right;">5207</p> <p>1 APPEARANCES (Continued):</p> <p>2 Counsel for Amazon Prime Music:</p> <p>3 MICHAEL S. ELKIN, ESQ.</p> <p>4 THOMAS PATRICK LANE, ESQ.</p> <p>5 DANIEL N. GUISBOND, ESQ.</p> <p>6 STACEY FOLTZ STARK, ESQ.</p> <p>7 SCOTT M. AHMAD, ESQ.</p> <p>8 SCOTT R. SAMAY, ESQ.</p> <p>9 JENNIFER GOLINVEAUX, ESQ.</p> <p>10 Winston & Strawn, LLP</p> <p>11 200 Park Avenue</p> <p>12 New York, New York 10166</p> <p>13 212-294-6700</p> <p>14</p> <p>15 Counsel for Google, Inc.:</p> <p>16 KENNETH STEINTHAL, ESQ.</p> <p>17 JOSEPH WETZEL, ESQ.</p> <p>18 DAVID P. MATTERN, ESQ.</p> <p>19 KATHERINE E. MERK, ESQ.</p> <p>20 JASON BLAKE CUNNINGHAM, ESQ.</p> <p>21 King & Spalding, LLP</p> <p>22 101 Second Street, Suite 2300</p> <p>23 San Francisco, CA 94105</p> <p>24 415-318-1211</p> <p>25</p>	<p style="text-align: right;">5209</p> <p>1 Dr. Leonard. You remain under oath.</p> <p>2 THE WITNESS: Good morning.</p> <p>3 MR. JANOWITZ: And I don't think this is</p> <p>4 restricted. In fact --</p> <p>5 JUDGE FEDER: You know it's not</p> <p>6 restricted?</p> <p>7 CROSS-EXAMINATION -- Resumed</p> <p>8 BY MR. JANOWITZ:</p> <p>9 Q. Good morning, Dr. Leonard.</p> <p>10 A. Good morning.</p> <p>11 Q. Dr. Leonard, I'd like to direct your</p> <p>12 attention to your criticisms of Dr. Rysman's</p> <p>13 opinions.</p> <p>14 A. Okay.</p> <p>15 Q. And, in particular, Dr. Rysman's opinion</p> <p>16 that a per-play based royalty is inappropriate,</p> <p>17 which is your opinion, correct?</p> <p>18 A. I'm sorry, his opinion --</p> <p>19 Q. It is your opinion --</p> <p>20 A. Right.</p> <p>21 Q. -- that a -- that the per-play based</p> <p>22 royalty is inappropriate?</p> <p>23 A. I think it's less preferable certainly</p> <p>24 than a percentage-of-royalty with the -- the TCC and</p> <p>25 per-subscriber minimum.</p>
<p style="text-align: right;">5208</p> <p>1 PROCEEDINGS</p> <p>2 (9:22 a.m.)</p> <p>3 JUDGE BARNETT: Good morning. Please be</p> <p>4 seated.</p> <p>5 It wasn't until I sat down here and had</p> <p>6 to face all of you, that I realized we haven't given</p> <p>7 you a response about the findings and conclusions.</p> <p>8 We're not prepared to do that yet.</p> <p>9 MR. STEINTHAL: Just one housekeeping</p> <p>10 matter. You asked -- you gave us the opportunity</p> <p>11 yesterday to designate something as restricted if we</p> <p>12 thought it was appropriate on behalf of Google.</p> <p>13 We're fine with the record as it is open.</p> <p>14 JUDGE BARNETT: Thank you, Mr. Steintal.</p> <p>15 Thank you very much.</p> <p>16 Mr. Janowitz, are you still</p> <p>17 cross-examining this witness?</p> <p>18 MR. JANOWITZ: I am, yes.</p> <p>19 JUDGE BARNETT: You may proceed.</p> <p>20 Whereupon--</p> <p>21 GREGORY LEONARD,</p> <p>22 a witness, called for examination, having previously</p> <p>23 been duly sworn, was examined and testified further</p> <p>24 as follows:</p> <p>25 JUDGE BARNETT: Good morning,</p>	<p style="text-align: right;">5210</p> <p>1 Q. Less preferable?</p> <p>2 A. Yes.</p> <p>3 Q. But perhaps workable?</p> <p>4 A. No, because we have a better alternative,</p> <p>5 so I'm suggesting that's a better way of proceeding.</p> <p>6 Q. I understand. But if that alternative</p> <p>7 weren't there, this would be a workable alternative,</p> <p>8 correct?</p> <p>9 A. If the only way in the world to proceed</p> <p>10 was to have a per-play royalty and the alternative</p> <p>11 was to have, you know, a complete collapse of -- of</p> <p>12 society, yes, I would accept that, but since that's</p> <p>13 not where we are --</p> <p>14 Q. Well --</p> <p>15 A. -- and the existing system has worked</p> <p>16 perfectly well, I think we can continue to use it,</p> <p>17 and that's my opinion.</p> <p>18 Q. Okay.</p> <p>19 JUDGE STRICKLER: Dr. Leonard.</p> <p>20 THE WITNESS: Yes.</p> <p>21 JUDGE STRICKLER: Good morning.</p> <p>22 THE WITNESS: Good morning.</p> <p>23 JUDGE STRICKLER: I have a question for</p> <p>24 you about how to handle the until the complete</p> <p>25 collapse of --</p>

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<p>5211</p> <p>1 THE WITNESS: Society. 2 JUDGE STRICKLER: -- society. So I don't 3 know. I don't -- 4 THE WITNESS: Yeah, well, it could be 5 coming; who knows? 6 JUDGE STRICKLER: But if we were at a 7 per-play rate, as you and counsel have been 8 discussing, as opposed to a percentage rate, could a 9 per-play rate mimic some of the advantages of a 10 percentage-of-revenue rate if you had multiple 11 per-play rates based upon the nature of the service 12 in question such as ad-supported versus 13 subscription, by way of example? 14 THE WITNESS: So that would solve certain 15 problems that I've been concerned with, which is 16 that a one size per-play rate fitting all is going 17 to not work in a lot of cases. So, yes. 18 But, on the other hand, it still has the 19 disadvantage of, you know, not -- from my point of 20 view, not being the efficient way to proceed. You 21 want -- I think you want to charge for access and 22 let people listen to as much as they want without, 23 you know, in a subscription service, without having 24 to pay an incremental fee. And I'm worried that 25 that would -- you know, that would -- system may</p>	<p>5213</p> <p>1 THE WITNESS: Correct, right. 2 JUDGE STRICKLER: Are you advocating 3 something that you would -- you would understand to 4 be a two-part tariff on the upstream level, which is 5 the rate we're setting here? 6 THE WITNESS: Yeah, I mean, that's a -- 7 so if you charge a percentage-of-revenue, and I'm 8 talking about a subscriptions-based system, but then 9 you're basically saying for subscribers paying, 10 let's say, ten dollars, you're charging a fee for 11 them to have access to the library. 12 JUDGE STRICKLER: What do you -- what's 13 the upstream version equivalent of that? I 14 understand that's downstream. 15 THE WITNESS: Yes. 16 JUDGE STRICKLER: So I'm paying \$9.99 a 17 month -- 18 THE WITNESS: Right. 19 JUDGE STRICKLER: -- for all-you-can-eat 20 service. So the \$9.99 is my -- is my -- the first 21 part of the tariff. The second part is essentially 22 zero. 23 THE WITNESS: Right, that's right. 24 JUDGE STRICKLER: But what is -- what is 25 the equivalent upstream? How does -- what is the</p>
<p>5212</p> <p>1 change if a per-play structure were used. 2 JUDGE STRICKLER: Would it be fair to say 3 that both a percentage-of-revenue approach and a -- 4 an approach with multiple tiers of per-play rates 5 are each different ways of price discrimination 6 because they vary the unit price? 7 THE WITNESS: They are, but, again, one 8 has the potential of adding a price for incremental, 9 you know, usage, which I don't think is wise here. 10 I think it's better to have -- again, given that we 11 have the per-subscriber minima, that takes care of 12 some of the problems that have been expressed. 13 And that, together with a 14 percentage-of-revenue, I think, is a much better way 15 to proceed. 16 JUDGE STRICKLER: You describe that as a 17 -- as a form of two-part tariff? 18 THE WITNESS: Yeah. Yes, in a way, yes, 19 because you're charging once for the access and 20 letting people then use as much as they want or you 21 can think of it as the usage is priced at the 22 incremental cost, which is zero here, largely. So, 23 yeah, that's exactly what a two-part tariff is. 24 JUDGE STRICKLER: Well, that's a two-part 25 tariff at the downstream level, right?</p>	<p>5214</p> <p>1 efficient way to transfer that two-part tariff 2 approach downstream? 3 THE WITNESS: Well, you can -- 4 JUDGE STRICKLER: Without it being -- 5 THE WITNESS: Yeah. So I think -- so if 6 you have a 10 and a half percent royalty, that's 7 \$1.05, I guess, on per subscriber. And so you can 8 think of the Service really as charging, as part of 9 its two-part tariff, it's charging \$1.05 as -- 10 that's part of the two-part tariff that the user is 11 paying to have access. 12 So, really, that -- the royalty is being 13 set up as a two-part tariff as well. It's \$1.05, in 14 the case, in the example I gave, and the user is 15 kind of paying that and then getting access and 16 paying zero incremental royalty for the usage from 17 there on. 18 I mean, it's almost like if you think -- 19 think about the service for a minute as being 20 transparent. And the user was contracting directly 21 with the Copyright Owners, then they would be paying 22 a fixed fee to get access to the Copyright Owners' 23 library. 24 JUDGE BARNETT: Okay. If it's a -- if 25 it's a 10 dollar subscription price and -- and the</p>

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<p style="text-align: right;">5215</p> <p>1 rate is 10 and a half percent of revenue --</p> <p>2 THE WITNESS: Right.</p> <p>3 JUDGE BARNETT: -- revenue is not the</p> <p>4 same as subscription payment. Revenue can be</p> <p>5 defined very many ways, can include a lot, can</p> <p>6 exclude a lot. There's not a straight pass-through</p> <p>7 of \$9.99 per subscriber to -- to the 10 and a</p> <p>8 half percent that goes to the Copyright Owners.</p> <p>9 THE WITNESS: Well, I think --</p> <p>10 JUDGE BARNETT: But some -- some</p> <p>11 subscriptions from \$4.99, some are \$14.99 for a</p> <p>12 family, some are zero.</p> <p>13 JUDGE FEDER: Some are bundled.</p> <p>14 JUDGE BARNETT: Some are bundled.</p> <p>15 THE WITNESS: Right. Yeah, so I'm</p> <p>16 talking about the simplest case of the part B</p> <p>17 subscription service. When we get --</p> <p>18 JUDGE BARNETT: There's nothing simple</p> <p>19 here, Dr. Leonard. We don't want the simple. We</p> <p>20 can't deal with the simple.</p> <p>21 THE WITNESS: Sure.</p> <p>22 JUDGE BARNETT: Okay? So --</p> <p>23 THE WITNESS: Yeah. So I mean there's</p> <p>24 two answers. One is if -- take a family plan, for</p> <p>25 instance. So I think the point there, this is an</p>	<p style="text-align: right;">5217</p> <p>1 JUDGE BARNETT: I get the -- I get the</p> <p>2 willingness to pay argument. Okay. The argument of</p> <p>3 the Services is we're bringing people in who</p> <p>4 wouldn't otherwise be there by price discrimination.</p> <p>5 THE WITNESS: Yes.</p> <p>6 JUDGE BARNETT: But why should I, as the</p> <p>7 songwriter, publisher, be -- in that circumstance,</p> <p>8 be required to accept less for the same product?</p> <p>9 THE WITNESS: Yeah, that's a very good</p> <p>10 question. And I think the answer is that the</p> <p>11 product has less value in that context. So, you</p> <p>12 know, one of the fundamental premises of economics</p> <p>13 is that a given product can vary in value depending</p> <p>14 on how it's used and who's -- who's using it.</p> <p>15 You know, I -- I might like a given</p> <p>16 product a lot more than somebody else. I'd be</p> <p>17 willing to pay a lot more for it. In that sense,</p> <p>18 the product has more value to me than to that other</p> <p>19 person. If it were possible for the producer to</p> <p>20 separate me from somebody else, identify us as</p> <p>21 somebody who is willing to pay more versus willing</p> <p>22 to pay less, then they're able to price that product</p> <p>23 differently to each of us in accordance with our</p> <p>24 difference in values and, therefore, extract, in a</p> <p>25 sense, more of the value from us combined than they</p>
<p style="text-align: right;">5216</p> <p>1 example of where you're using a part B subscription</p> <p>2 and you're really targeting it at the group of</p> <p>3 consumers with lower willingness to pay. So you're</p> <p>4 trying to get them -- offer them a lower price to</p> <p>5 entice them to take it.</p> <p>6 The same principles I just outlined apply</p> <p>7 there, that if we take 10 and a half percent of that</p> <p>8 per subscriber fee that they're paying to subscribe,</p> <p>9 I think that is the appropriate royalty there. And,</p> <p>10 again, works like a two-part tariff.</p> <p>11 Now let's move to the more -- you're</p> <p>12 right, that's not simple, but certainly we'd all</p> <p>13 agree that something like, you know, Amazon is more</p> <p>14 complicated.</p> <p>15 JUDGE BARNETT: Let me ask you a question</p> <p>16 about that.</p> <p>17 THE WITNESS: Yes.</p> <p>18 JUDGE BARNETT: So if I'm a songwriter or</p> <p>19 a publisher and I have a work that I'm getting --</p> <p>20 that has value -- I mean, this is one of the big</p> <p>21 questions, isn't it?</p> <p>22 THE WITNESS: Yes.</p> <p>23 JUDGE BARNETT: What is the value of that</p> <p>24 artistic work?</p> <p>25 THE WITNESS: Right.</p>	<p style="text-align: right;">5218</p> <p>1 would otherwise be able to do.</p> <p>2 And so that's the idea here. I think the</p> <p>3 -- the idea that music, or anything for that matter,</p> <p>4 has a value that is the same in every use and to</p> <p>5 everyone is just not really the right way to think</p> <p>6 about it because, you know, again, it's just some</p> <p>7 people value it a lot, some people don't.</p> <p>8 If we can separate those people out and</p> <p>9 price differently to them, we actually do -- as a</p> <p>10 Service, as the providers of the inputs, we can do a</p> <p>11 lot better from a revenue perspective. And that's</p> <p>12 really what I think the advantage of the</p> <p>13 percentage-of-revenue structure is in situations</p> <p>14 where, you know, the revenue is clear.</p> <p>15 Now, again, the situation like Amazon is</p> <p>16 a different one, where there's no distinct revenue</p> <p>17 for it. I think the Echo situation is a bit</p> <p>18 different, but, you know, the Prime, Amazon Prime,</p> <p>19 is a bit different. And there we -- you know, we</p> <p>20 obviously have to do something else.</p> <p>21 And there -- you know, again, we can</p> <p>22 think of the way it's existing right now is there's</p> <p>23 a percent of TCC. You know, if you believe the</p> <p>24 labels kind of take care of themselves, using</p> <p>25 a percent of TCC for the musical works makes a lot</p>

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<p>5219</p> <p>1 of sense. If you -- you know, then they the 2 question is what should the right percentage be to 3 apply there. 4 If we think we can come up with a 5 per-subscriber number that makes sense and, again, 6 that number may have to differ depending on what 7 kind of service it is, then that's something that 8 can be done. 9 And then as I remember under Subpart C, I 10 think there are situations, if I'm remembering 11 right, situations where it actually specifies for 12 particular services how to unbundle some revenue and 13 perhaps apply a percent of revenue to that unbundled 14 revenue. So it would be possible, again, to kind of 15 impute a revenue for a service like Amazon Prime 16 that -- that there's no explicit revenue generated. 17 So, I mean, those are the three 18 possibilities, it seems to me, to address this 19 problem, which I agree is difficult. And -- but I 20 think each one of those already exists in the 21 current 115 setup, if I'm not mistaken. 22 JUDGE FEDER: Well, just with regard to 23 the unbundling issue, under the current 115 setup, 24 we have a situation where Amazon is declaring zero 25 revenue --</p>	<p>5228</p> <p>1 O P E N S E S S I O N 2 BY MR. JANOWITZ: 3 Q. Dr. Leonard, one thing I heard in the -- 4 in your responses to the -- to the Panel was that 5 the per-play royalty would lead to a limitation of 6 usage. It's certainly possible? That's one of 7 the -- 8 A. One of my concerns, yes. 9 Q. Yes. And -- and you cited Pandora as 10 having limited usage, correct? Limited, you know -- 11 I guess limited usage. 12 A. I think there was a time when they 13 attempted to do certain things that would have that 14 effect, and I think they made their subscribers 15 unhappy, as I remember, and there was a change in 16 that policy. 17 Q. Isn't it true that Spotify also has 18 limited functionality or usage? It's not a -- it's 19 not a -- it's not a full on-demand service, is it? 20 A. In what regard are you -- 21 Q. Well, have you ever used Spotify? 22 A. I am not actually a Spotify subscriber. 23 Q. Okay. Have you acquainted yourself with 24 the way Spotify works? 25 A. I mean, again, I haven't used it, but I'm</p>
<p>5220</p> <p>1 THE WITNESS: Right. 2 JUDGE FEDER: -- attributing zero 3 revenue -- 4 JUDGE STRICKLER: You want it restricted? 5 MR. ELKIN: Yes, if you don't mind. 6 JUDGE FEDER: Let's go to restricted, 7 then. 8 MR. LANE: And, Your Honors, there was 9 one answer that came up with Dr. Katz yesterday that 10 I think also sort of fell into this category. We'll 11 provide the markings with respect to that, since we 12 were in and out of restricted session. 13 JUDGE BARNETT: Thank you. 14 MR. LANE: A bit. 15 JUDGE BARNETT: Yeah, I don't think we've 16 gone anywhere yet, because everybody knows how much 17 Amazon Prime costs, right? And that the music is a 18 -- is a benefit that way. 19 MR. LANE: Yeah, it's more of a -- the 20 revenue points. 21 JUDGE BARNETT: Understand, understand. 22 (Whereupon, the trial proceeded in 23 confidential session.) 24 25</p>	<p>5229</p> <p>1 generally aware, yeah. I've just been asking what 2 you're referring to. 3 Q. And when I say Spotify, I mean 4 ad-supported. 5 A. Oh, ad-supported, I see. Yes. Right. 6 Yes. 7 Q. Are you familiar with the limitations on 8 functionality in ad-supported? 9 A. To some degree, but, again, I haven't 10 used it myself. 11 Q. So you understand that you just can't 12 call up any song the way you can in -- on a, you 13 know, unlimited subscription service, correct? 14 A. I think I'd -- I'd say I'm generally 15 aware of that, but, again, I haven't -- you know, I 16 haven't actually used it myself. So I'm not sure 17 quite how it feels when you try to use the service. 18 Q. And you -- do you understand that there's 19 a shuffle mechanism in it, so that you can't, for 20 example, just pick songs even in an album one by 21 one; it shuffles the album according to whatever 22 algorithm Spotify has? 23 A. I believe I'm aware of that, yes. 24 Q. So you would agree, then, that Spotify 25 already has limitations in the way that it can be</p>

<p>5230</p> <p>1 used that you saw as a negative outcome of a 2 per-play model?</p> <p>3 A. It has that. I mean, part of that is, of 4 course, they want to funnel people up to the 5 subscriber service. So, you know, again, the ads 6 certainly make it less attractive. And, of course, 7 it's also the way you monetize it, but, you know, 8 there are other things you want to do to push, nudge 9 people, if you can call it that, in the right 10 direction. That's really what's motivating that 11 there. And, again, to the extent that that's 12 successful, it's something that benefits the 13 Copyright Owners.</p> <p>14 Q. But you also know that many people, 15 millions of Spotify ad-free -- ad listeners refuse 16 to be nudged; they just stay with that service, 17 correct?</p> <p>18 A. Yeah, and to the extent that they are 19 generating ad revenue that leads to royalties that, 20 again, benefit the Copyright Owners.</p> <p>21 Q. Now, you were talking earlier also about 22 the -- the desirability of separating out consumers 23 based on the value they -- they perceive in music.</p> <p>24 A. If you can do that, yes.</p> <p>25 Q. If you can do it. Now, again, going back</p>	<p>5232</p> <p>1 Q. Would.</p> <p>2 A. You know, it's -- look, no -- it's very 3 rare to have a situation where you get what's called 4 perfect price discrimination where you know -- you 5 know, we all have a little sign on our head that 6 says I'm willing to pay 10 dollars, you have one 7 that says I'm willing to pay 9 dollars, and then the 8 price you get charged is 9 and the price I get 9 charged is 10. That's not going to happen.</p> <p>10 But Spotify has the incentives to set 11 these things up to do the funneling, to do the 12 separation, and, again, it's something that 13 ultimately benefits Copyright Owners as well.</p> <p>14 JUDGE STRICKLER: Here's a question 15 following up on that. As you -- based on your 16 statement, if the -- if the Copyright Owners benefit 17 as well from this second- or third-degree price 18 discrimination that -- that you're positing, which 19 is -- which is a percentage-of-revenue rate, if we 20 were to set a per-user rate instead, and it's in the 21 interest of both the Services and the Copyright 22 Owners to deviate from that and negotiate around 23 that statutory constraint because it maximizes 24 revenue for both sides, would you expect them to 25 bargain for a different structure that would be a</p>
<p>5231</p> <p>1 to Spotify ad-supported, does Spotify ad-supported 2 separate out users according to the value that they 3 see in the music?</p> <p>4 A. Again, what I was just describing, by 5 making it -- you know, imposing some constraints on 6 the usage as, you know, including having to endure 7 ads, that is a mechanism. But, I mean, the 8 funneling is itself a mechanism to separate out the 9 people who really value music and want to just be 10 able to listen to what they want to listen to, 11 versus people who, you know, are not willing to pay 12 that amount of money or willing to accept some of 13 the other burdens and then pay a lower price 14 effectively. And, you know, it generates less money 15 for Spotify and ultimately for the Copyright Owners.</p> <p>16 But, again, those are people who are -- 17 probably a lot of them are not going to pay the 18 higher subscription price.</p> <p>19 Q. Right. And you say a lot of them are not 20 going to be willing to pay it. But there may be 21 millions of people in there who both could and, 22 under certain circumstances, would pay more, isn't 23 that right?</p> <p>24 A. I mean, could, I don't think, has much 25 utility here, but --</p>	<p>5233</p> <p>1 percentage structure? If it's indeed in their best 2 interest, rational actors would -- would flee the 3 per-user rate and would -- would go to the 4 percentage rate, right?</p> <p>5 THE WITNESS: Do you mean per player per 6 user?</p> <p>7 JUDGE STRICKLER: Oh, I'm sorry, I 8 misspoke. I meant per player.</p> <p>9 THE WITNESS: Okay. Yeah, no, I just 10 wanted to -- but then we get basically this exercise 11 going on in -- in negotiations and not necessarily 12 governed by the 801(b)(1) factors. So, I mean, I 13 think the problem -- I mean, I think the point of 14 having this kind of compulsory licensing setting is 15 to reduce transactions cost and to, you know, 16 prevent the exercise of market power and prevent 17 disruption in the marketplace.</p> <p>18 So, I mean, it seems to me -- I can 19 imagine a situation where regardless -- you know, 20 again, you can't address all the complexities here, 21 that there might be some situation where there's 22 some news service that really doesn't fit in well 23 and -- and the parties maybe can hammer out 24 something differently, but I don't think that should 25 be the default. It seems to me we should try to</p>

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<p>5234</p> <p>1 cover as many of the possibilities as we can. 2 JUDGE STRICKLER: Thank you. 3 BY MR. JANOWITZ: 4 Q. Dr. Leonard, in -- in paragraph 81 of 5 your rebuttal report, you point out that in the PSS 6 SDARS II proceeding, the rate percent is a 7 percentage of gross revenue, correct? 8 A. Yes. 9 Q. That's support -- that's support for your 10 position that that's how this matter should be 11 resolved as well, correct? 12 A. It's just -- it's an example, again, of 13 where percentage-of-revenue was used, at least as I 14 understand it. 15 Q. Right. Now, you're aware, aren't you, 16 that in Web IV, the CRB established a royalty rate 17 on a per-play basis? 18 A. Yes. 19 Q. And you're aware that Dr. Katz in Web IV 20 argued for a per-play royalty and against a 21 revenue-based royalty, correct? 22 A. I'm aware of that, yes. 23 Q. Did you consider Dr. Katz's arguments in 24 Web IV when you wrote paragraph 1 of your -- of your 25 rebuttal report?</p>	<p>5236</p> <p>1 specific discussion of that. 2 JUDGE FEDER: Okay. All right. Fair 3 enough. Thanks. 4 JUDGE STRICKLER: Another question since 5 we're on the topic of Web IV. Do you recall that in 6 Web IV that there was a different rate set, a play 7 rate for subscription and for ad-supported? 8 THE WITNESS: Again, that sounds 9 familiar, but it has been a while since I've read 10 that. 11 JUDGE STRICKLER: Assuming that's what it 12 says, is that an example of using a per-play rate to 13 create price discrimination? 14 THE WITNESS: So, sorry, what is a 15 per-play rate for -- which one? 16 JUDGE STRICKLER: One for subscription 17 and one for ad-supported. 18 THE WITNESS: Oh, you mean different 19 per-play rates? 20 JUDGE STRICKLER: Different rates. Lower 21 rate for ad-supported. 22 THE WITNESS: Well, yeah, right, that 23 would be an example recognizing that the value in 24 the two settings was different and that the -- you 25 know, the revenues that -- or I should say profits,</p>
<p>5235</p> <p>1 A. When I wrote paragraph -- 2 Q. 81. 3 A. 81? I don't -- I don't know that I went 4 back and checked what exactly he was saying in the 5 context of that proceeding. 6 Q. If you were aware of the decision in Web 7 IV and Dr. Katz's position, why didn't you refer to 8 it in paragraph 81 when you discussed the other 9 proceeding in support of your position? 10 A. Well, I'm just trying to indicate here 11 that there are a lot of situations where a 12 percentage-of-revenue is used and certainly where 13 there are some situations where it's not. Again, as 14 I mentioned, in IPO licensing you have a wide 15 variety of things that go on, but certainly it's not 16 surprising to see a percentage-of-revenue. That's 17 really my point. 18 Q. So -- 19 JUDGE FEDER: Dr. Leonard -- I'm sorry, 20 Mr. Janowitz. 21 Are you familiar with the reasoning in 22 the SDARS decisions as to why this body adopted a 23 percentage revenue rate for satellite radio? 24 THE WITNESS: I read -- read it, but I 25 confess, as I'm sitting here, I don't recall the</p>	<p>5237</p> <p>1 I suppose, that the Services were getting might be 2 different in the two situations and then the royalty 3 should be different, however that's expressed. So, 4 yeah, it does seem to be an example of that. 5 JUDGE STRICKLER: Thank you. 6 BY MR. JANOWITZ: 7 Q. Dr. Leonard, in -- in paragraph 82 of 8 your rebuttal report, you state that a revenue-based 9 rate structure makes economic sense because 10 songwriters and interactive streaming service 11 providers collectively share in both the upfront 12 investment in the service offering and the upside or 13 downside rewards associated with those investments. 14 Correct? 15 A. Yes, that's what I said here. 16 Q. What investments do the Copyright Owners 17 have in the interactive services? 18 A. Well, I think I'm talking here about to 19 -- the extent to which, I think, Dr. Rysman was 20 talking about, let's say, a price discount to build 21 user base. So that would -- that's what I would 22 term an investment. They're lowering the price 23 today in order to build a base and make more revenue 24 tomorrow. 25 Now, when you do that, because the</p>

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<p style="text-align: right;">5238</p> <p>1 elasticity of demand is probably sufficiently high, 2 you may actually increase revenue today, which would 3 increase royalties. But let's assume for the moment 4 that you actually forgo some revenue. So that's 5 really what I'm talking about here. 6 So the extent that's happening, you know, 7 if revenue today is lower than it would otherwise be 8 if no long-run view were taken, but it does lead to 9 higher revenue later on, then that's something where 10 there's a sharing in the investment, which is the 11 discount, and the return, which comes later. 12 Q. Is it relevant to your opinion that the 13 Copyright Owners have not voluntarily chosen to make 14 this so-called investment in the promotional pricing 15 strategies of the streaming services? 16 A. Not really because for two reasons. One 17 is, you know, it's pretty rare for a supplier of an 18 input to be able to dictate what the user of that 19 input does with it. You know, the user of the 20 input, the downstream company is going to have a lot 21 more information about -- about the business, about 22 what makes sense. 23 And then perhaps more importantly, it's 24 just the point that, you know, in this sense the 25 incentives are pretty well aligned. And, you know,</p>	<p style="text-align: right;">5240</p> <p>1 JUDGE STRICKLER: Well, you have control 2 over your own pricing -- 3 THE WITNESS: Yes. 4 JUDGE STRICKLER: -- of your own input. 5 THE WITNESS: Right. 6 JUDGE STRICKLER: You don't have control 7 over what they do with the input and the investments 8 that are made downstream. Well, here we're talking 9 about moving those investment decisions and the 10 associated risks upstream to an entity that -- that 11 would just simply have to implicitly go along with 12 that, if the rate incorporates the decision-making 13 process of the downstream purchaser, right? 14 THE WITNESS: Okay, well, you know, under 15 a per-play rate, you know, again, the -- the 16 incentives -- conditional on having a per-play rate, 17 the Services -- I mean, the Copyright Owners would 18 like the Services to make the subscriber base as big 19 as possible, which, you know, is more or less going 20 to be the same as any revenues go up too. 21 But I think the problem is that's 22 conditional on having a per-play rate. But I think 23 the point I'm trying to make is that that actually 24 could lead to a reduction ultimately in revenues. 25 And a reduction in royalties because of the nature</p>
<p style="text-align: right;">5239</p> <p>1 look, the service wants to make a lot of revenue. 2 That's, of course in a percentage-of-revenue setup 3 going to lead to more royalties as well. So there's 4 -- you know, there's a good aligning of incentives. 5 JUDGE STRICKLER: But when you say 6 there's an aligning of incentives, following up on 7 counsel's question, that's a conclusion that would 8 otherwise be forced upon Copyright Owners if we have 9 this percentage-of-revenue structure as opposed to a 10 per-play structure, right? You're saying it would 11 be efficient, if I'm understanding you correctly, 12 because the Services know how to maximize revenue 13 because they're in the business of supplying the 14 streaming service to listeners. 15 But to the extent the Copyright Owners 16 would not have -- would not share in or concur in 17 that decision, they would have -- under a 18 percentage-of-revenue structure, they would really 19 have no choice but to -- but to join in those 20 investment decisions. Isn't that right? 21 THE WITNESS: Well, I mean, I guess, 22 first off, again, that's the way the world normally 23 works. I mean, it ' somewhat rare, I think, to have 24 control over how a downstream firm operates. 25 And, again --</p>	<p style="text-align: right;">5241</p> <p>1 of the structure. And businesses and the way 2 they've set things up, I think, is a good indication 3 of the nature of the business, and they're in a 4 better position to know how to -- to operate it. 5 JUDGE STRICKLER: If I could just follow 6 up on that, that seems to suggest that what you're 7 saying is that the existing Subpart B rates, which 8 were the result of a settlement renewed in 2012, are 9 reflective of a willingness of the Copyright Owners 10 to delegate such investment-type decisions and to 11 share in such investment-type decisions with the 12 streaming services, as opposed to the position that 13 has been made by some of the Copyright Owners' 14 witnesses, which is that the industry had previously 15 been not mature, had been expanding, so there was a 16 greater willingness to share risk at the outset, but 17 now that the industry is not only firmly -- more 18 firmly entrenched but that we have much bigger 19 players like Amazon, Apple, and Google, that's a 20 position they no longer want to take. 21 You seem to be saying that there's 22 something inherent in the nature of this market 23 structure that would -- that makes -- makes it in 24 some sense inevitable, a revealed preference for a 25 percentage-of-revenue rate downstream to enlarge the</p>

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<p>5242</p> <p>1 pie for both the Copyright Owners and the streaming 2 services. 3 THE WITNESS: Yeah, so I would say a 4 couple things there. One is, yes, there was a 5 settlement. Yes, they did agree to this particular 6 structure back then. And I do think that's 7 important as a sign of a revealed preference, as you 8 said. 9 So then the question is have things 10 changed? And while they have, of course, changed in 11 the sense that there are more revenues, the question 12 is whether those changes were largely anticipated at 13 the time the settlement was done in 2012. I think 14 what's clear is that I think most people were aware 15 that Google and Apple were considering a service, so 16 I don't think -- although they hadn't actually -- 17 weren't actually in then, I think it was known that 18 that was likely to happen. 19 I think they were perhaps involved to 20 some extent in that earlier proceeding. 21 JUDGE STRICKLER: Well, whether -- 22 whether the large entities or the ecosystem 23 entities, I'll call them -- 24 THE WITNESS: Yeah. 25 JUDGE STRICKLER: -- were in it or not,</p>	<p>5244</p> <p>1 THE WITNESS: Yeah. 2 JUDGE STRICKLER: That's -- that's one of 3 the easy -- easiest things about this case. 4 THE WITNESS: Right, right. 5 JUDGE STRICKLER: I know they don't agree 6 with you. 7 THE WITNESS: Right. 8 JUDGE STRICKLER: But the more -- the 9 more salient question is whether or not -- and 10 you've just addressed it, I guess -- is whether the 11 2012 settlement reveals a preference for that and 12 that the changes -- the question that has to be 13 wrestled with, a question that has to be wrestled 14 with, which is not an easy question, is whether that 15 revealed preference is endemic to this industry so 16 it's -- it exists to this day or whether there have 17 been changes that make that benchmark, that 2012 18 settlement as a benchmark, no longer appropriate? 19 THE WITNESS: Yeah, I think the hard part 20 from my perspective is obviously I don't know what 21 was in people's minds back in 2012, which is, you 22 know, what their considerations were. So it's hard 23 for me to say. 24 But I would say that, you know, from my 25 perspective, again, what people knew or should have</p>
<p>5243</p> <p>1 it seems to me what you're saying is that there's 2 something inherent in the market structure based on 3 the pricing and the marginal cost of additional 4 streams that leads to a percentage-of-revenue -- and 5 maybe I'm putting words in your mouth here and I 6 don't want to so tell me if this is wrong -- but 7 when you add in these ecosystem, larger ecosystem 8 entities, now we have measurement problems on 9 revenue. It's not that revenue is -- is an 10 inefficient or inappropriate structure, if I 11 understand you correctly, but you're acknowledging 12 that we do have new measurement problems that we 13 didn't have when we had a predominantly pure-play 14 grouping of -- of streaming services? 15 THE WITNESS: Yes. So maybe I'm -- I 16 guess what I'd say is I actually do think the -- the 17 percentage-of-revenue structure -- again, and I 18 would agree the minima should be in there, so I'm 19 including that in the whole structure -- is actually 20 the best way to proceed from the Copyright Owners' 21 view, point of view as well. I'm not saying they 22 agree with me on that, but I do think that they're 23 actually -- that that is the right way to go. 24 JUDGE STRICKLER: I know -- I know they 25 don't agree with you.</p>	<p>5245</p> <p>1 known reasonably back in 2012 versus the way things 2 sit today are not sufficiently different that 3 somebody could say, you know, oh, my gosh, back then 4 what we did made sense and all of a sudden it 5 doesn't make sense anymore. 6 JUDGE STRICKLER: I'm not interested in 7 your mind reading or -- 8 THE WITNESS: Right. 9 JUDGE STRICKLER: -- unless we have good 10 evidence as to what people were thinking. I'm more 11 interested in your economic analysis and the other 12 experts' economic analysis of the 2012 settlement 13 and why it was entered into with that structure and 14 why those rates were set. And I think you've 15 already said it, so I don't want to beat a dead 16 horse, that you take it to be a revealed preference 17 and that the changes in the market don't change that 18 reason -- the efficiency of that revealed 19 preference. 20 THE WITNESS: Yeah, no, absolutely. I 21 think it's still the right thing to do and, you 22 know, for instance, Google has entered into 23 agreements where that structure has been used. As 24 you pointed out, there's no reason that structure 25 has to be used if the parties thought --</p>

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<p style="text-align: right;">5246</p> <p>1 JUDGE STRICKLER: Hang on. 2 MR. WETZEL: If we're going to go into 3 more detail about Google's agreements, I'd ask that 4 we go to a closed session. 5 JUDGE STRICKLER: You don't have to 6 answer with specificity, but -- but with regard 7 generally, of course, the response to that which 8 we've already heard is that, well, that's -- all 9 those agreements were done in the shadow of the 10 existing settlement, so they may not be revealing a 11 preference to -- to continue on with the 2012 12 settlement; they just reveal the fact that the 2012 13 settlement becomes -- casts such a shadow that you 14 really can't negotiate around it. 15 THE WITNESS: I guess I disagree. If 16 there was a much more efficient solution, then the 17 parties could have gotten to that, despite the 18 existence of the 115 structure. 19 JUDGE STRICKLER: Well, if it was a more 20 -- maybe if there was a more efficient structure 21 perhaps, but if the Copyright Owners could 22 appropriate more value in a different approach 23 absent the shadow, perhaps they would have. One 24 might differ over whether that's the efficient 25 result, but it might be reflective of the existing</p>	<p style="text-align: right;">5248</p> <p>1 Michael Jackson of songs. 2 THE WITNESS: Yeah, actually. Okay. 3 Probably even better, but it goes to my point that 4 the artist is -- is much more important than the 5 songwriter. But, anyway, you know, Michael Jordan 6 got paid a lot of money. Does Michael Jordan have 7 market power? No, he's getting paid a lot or was 8 paid a lot of money because he was really good at 9 what he did. Okay? 10 So that -- you could -- I would call that 11 a scarcity, you know, rent or whatever you want to 12 call it, some people might term it market power. 13 That's not what I'm talking about. That is 14 something that should appropriately be -- go to the 15 -- the songwriter or the artist or whoever it is. 16 What I'm talking about is, you know, the Cournot 17 complements problem, which I know has been beat to 18 death, or the, you know, aggregation of copyrights 19 into a must-have that then allows you to get a 20 higher price than you otherwise could. Those are 21 the issues I think need to be factored out in -- in 22 a setting like this where the 801(b)(1) factors come 23 into play. 24 JUDGE STRICKLER: Thank you. 25 JUDGE BARNETT: Dr. Leonard, there is</p>
<p style="text-align: right;">5247</p> <p>1 market power that would allow the Copyright Owners 2 to obtain a different share, a greater share than if 3 the shadow existed? 4 THE WITNESS: Yeah, but, I mean, if 5 that's market power, then I think under 801(b)(1), 6 you know, that's not something that should be 7 credited. 8 JUDGE STRICKLER: Not that you can answer 9 it, but one of the other witnesses, Dr. Watt, 10 corrected some of his writings to say there's market 11 power, then there's abuse of market power. 12 THE WITNESS: Right. 13 JUDGE STRICKLER: And are you saying that 14 if there's market power that's otherwise not 15 abusive -- I understand that's not a defined term in 16 my question -- that's not otherwise abusive, that we 17 should still correct for it? 18 THE WITNESS: Yes, I think -- well, I'm 19 sorry, let me back up. If what -- again, I don't 20 know what he meant. Here's what I would say, is 21 there's within -- a musical work has some sort of 22 value. It may have a lot of value because of it's 23 -- it's good, you know, it's the Michael Jordan of 24 songs. And in that situation -- 25 JUDGE STRICKLER: I think it's called the</p>	<p style="text-align: right;">5249</p> <p>1 also an issue that continues to bug me and that -- 2 THE WITNESS: I'll do my best to help. 3 JUDGE BARNETT: And that's the 4 dysphasia -- that might not be a word -- but the 5 dysphasia. In other words, if a songwriter today 6 writes a Number 1 hit song -- 7 THE WITNESS: Yeah. 8 JUDGE BARNETT: -- and the Services are 9 investing in the future, that songwriter is going to 10 get less than a new songwriter will get in three 11 years with a hit -- with a hit song when the 12 investment is done and the revenue is being captured 13 as opposed to reinvested. 14 THE WITNESS: Yeah, so -- 15 JUDGE BARNETT: How -- how fair, fair is 16 a strange concept, but -- 17 THE WITNESS: Yeah, so I guess I agree 18 that that's an issue. I mean, if somebody writes, 19 they have one hit and its now at a time when, for 20 whatever reason, they don't get as much as they 21 would if they wrote it a year from now, you know, I 22 was here when Dr. Katz talked about maybe the 23 publishers can do some smoothing. That's certainly 24 a solution. But I think another thing to think 25 about is what type of investments are being made.</p>

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<p style="text-align: right;">5250</p> <p>1 And really -- so, you know, one would be, 2 again, giving a discount off the price of the 3 service. As I noted, you know, what happens is it's 4 true that the price per subscriber might come down 5 as you discounted it, but the whole point is you do 6 that in order to get a lot more subscribers, so if 7 the elasticity of demand is greater than one in 8 absolute value, if I can use that term. What that 9 means is when you lower the price by a certain 10 amount, the revenue actually expands. 11 So that would be the type of investment 12 that would actually benefit the person who's writing 13 the song today because there would be more 14 subscribers. Although they would each be paying a 15 little less, the overall revenue is actually more. 16 So that's one type of investment where I don't think 17 this comes into play or actually goes in the other 18 direction. 19 The other type of investment would be the 20 service spends some money to do advertising or 21 something like that. That, again, is something that 22 hurts the Services' bottom line today, but it 23 doesn't affect or maybe it even benefits the 24 Copyright Owner. So that one isn't a problem. 25 The only one that's really a problem is</p>	<p style="text-align: right;">5252</p> <p>1 You know, that -- so that would be an 2 example. But I don't think those -- you know, I 3 think some Services have, you know, one month free, 4 but it's not something that lasts for tremendously 5 long. I doubt it would have a huge effect in the 6 sense of redistributing revenues. 7 So, again, there might be other examples, 8 but I think it's less of a problem than maybe has 9 been suggested. Does that help or? 10 JUDGE BARNETT: Thank you. 11 BY MR. JANOWITZ: 12 Q. Dr. Leonard, in -- in response to a 13 question that I think Judge Strickler's has, you 14 said it's rare for suppliers of an input to dictate 15 how that person who they're providing the input to 16 uses it. Do you remember saying that? 17 A. I mean, subject to laws and stuff of 18 course. 19 Q. Sure. And you said that's how it works, 20 right? 21 A. Well, in a lot of situations, yes, that's 22 how it works. 23 Q. Right. But isn't it true that in most of 24 those situations, you have control over your own 25 input? In other words, you get to set your price to</p>
<p style="text-align: right;">5251</p> <p>1 if you defer revenue from today to some later time. 2 And I confess it's -- it's hard to see what those 3 kind of investments are. And I'm not saying there 4 aren't any, but, you know, I think they're a lot 5 less common than the first two, which aren't 6 creating the problem that you're concerned with. 7 So I'm happy to -- if anybody has got any 8 examples they want to run by me, I'm happy to 9 entertain them. But, you know, the first two types 10 really aren't a problem in this sense. They're all 11 about certainly building a business that's bigger 12 later than it is now but, in general, would tend to 13 benefit the -- the Copyright Owners. 14 JUDGE BARNETT: As a homogenous whole? 15 THE WITNESS: Yeah. I mean, right. I 16 mean, so you could say somebody in the future -- 17 well, no. I mean, they would be benefitted by this 18 too. So I think -- just basically, I think it's 19 hard to argue with those kinds. Again, there might 20 be other kinds that somehow do defer revenue. You 21 know, obviously, if you gave it away for free -- so 22 there's an example. I could just give it away for 23 free today. That, although it's like a discount, 24 it's such a big discount that revenue actually falls 25 to zero, obviously.</p>	<p style="text-align: right;">5253</p> <p>1 the downstream user, correct? 2 A. Well, I mean, again, there's always 3 consideration exchange, but, you know, for instance, 4 again, in IP licensing, I can give you a license and 5 let's say you pay me a lump sum, you pay me 100 6 million dollars, I really have very little say on 7 what you do thereafter, what your business model is 8 or anything else. 9 Q. Right. But you've paid 100 million 10 dollars? 11 A. Right. Not per use, not per unit sold, 12 not anything else. Not even percentage-of-revenue. 13 You've just paid me 100 million dollars, and it's -- 14 you know, it's the so-called freedom to operate 15 license, right? It's the ultimate freedom to 16 operate. 17 Q. You -- you also said that, I think, in 18 response to another question, that the -- as an 19 alternative to the revenue model, a percentage of 20 the TCC would be okay too, but you pointed out that 21 21 percent, you think, is too high. Correct? 22 A. I'm saying that you obviously have to 23 look at what the number is, and given things I've 24 looked at, I think it's too high, yes. 25 Q. And Google has proposed a reduction of</p>

<p>5254</p> <p>1 the TCC to 13 and a half percent, correct?</p> <p>2 A. As I understand it, yes.</p> <p>3 Q. And -- but in concept, the -- the --</p> <p>4 measuring the mechanical royalty by a percentage of</p> <p>5 the TCC is something that -- that you could find</p> <p>6 acceptable, given the proper rate, correct?</p> <p>7 A. I mean, yeah, so it's, you know, part of</p> <p>8 Google's proposal. I think it's part of the other</p> <p>9 -- I haven't looked at them in tremendous detail --</p> <p>10 but the other service providers' proposals as part</p> <p>11 of the current 115 setup.</p> <p>12 So, you know, I think it's -- you know,</p> <p>13 it's obviously a useful part of things. In a</p> <p>14 situation where revenue is problematic, does it play</p> <p>15 -- could it play a bigger role? Yes, it could.</p> <p>16 Q. So measurement by reference to a sound</p> <p>17 recording royalty rate is not unacceptable to you?</p> <p>18 A. Again, if you set the percentage properly</p> <p>19 that takes into account things like the sound</p> <p>20 recording, I mean the labels' market power and other</p> <p>21 things like that, yes, I mean, it is part of the</p> <p>22 current setup and I think in a way it is used, it</p> <p>23 can serve a useful role.</p> <p>24 Q. I direct your attention to page 56 of</p> <p>25 your rebuttal report. The heading of section 4 on</p>	<p>5256</p> <p>1 Q. Are you denying that Amazon reports</p> <p>2 literally zero revenues on Prime Music?</p> <p>3 JUDGE BARNETT: Mr. Janowitz, this is</p> <p>4 where we close the courtroom as we did before?</p> <p>5 MR. JANOWITZ: Really?</p> <p>6 JUDGE BARNETT: When we got into revenue.</p> <p>7 MR. JANOWITZ: I'm sorry. I apologize.</p> <p>8 I thought this was -- it was not --</p> <p>9 JUDGE BARNETT: So are you going to</p> <p>10 pursue this line or --</p> <p>11 MR. JANOWITZ: Not much. And certainly</p> <p>12 not divulging anything, certainly.</p> <p>13 JUDGE BARNETT: Any more?</p> <p>14 MR. JANOWITZ: Any more, yes.</p> <p>15 JUDGE BARNETT: Okay.</p> <p>16 BY MR. JANOWITZ:</p> <p>17 Q. Isn't it clear, Dr. Leonard, that the</p> <p>18 bundling of Amazon Prime Music as part of its Prime</p> <p>19 service is, in fact, an opportunistic way to</p> <p>20 manipulate revenues?</p> <p>21 A. I totally disagree with that.</p> <p>22 Opportunistic has a particular meaning here. Or at</p> <p>23 least in economics.</p> <p>24 Q. I accept -- I accept your answer. Thank</p> <p>25 you.</p>
<p>5255</p> <p>1 that page is as follows: "There is no evidence, and</p> <p>2 Dr. Rysman presents no evidence, that interactive</p> <p>3 service providers have defined revenue in</p> <p>4 opportunistic ways to manipulate revenues resulting</p> <p>5 in lower royalty payments to songwriters."</p> <p>6 Did you write that heading?</p> <p>7 A. Absolutely.</p> <p>8 JUDGE STRICKLER: Which page were you on,</p> <p>9 please?</p> <p>10 MR. JANOWITZ: It's --</p> <p>11 JUDGE STRICKLER: I see the heading for</p> <p>12 Number 4.</p> <p>13 MR. JANOWITZ: Yes.</p> <p>14 JUDGE STRICKLER:</p> <p>15 BY MR. JANOWITZ:</p> <p>16 Q. And in the last sentence of paragraph 85,</p> <p>17 you say Dr. Rysman does not provide any reliable</p> <p>18 evidence that music streaming service providers</p> <p>19 define revenue in opportunistic ways. Is that</p> <p>20 correct?</p> <p>21 A. Yes, as I recall his initial report. I</p> <p>22 didn't see anything --</p> <p>23 Q. Have you seen any Amazon royalty reports?</p> <p>24 A. Amazon royalty reports? I may have. I</p> <p>25 don't recall.</p>	<p>5257</p> <p>1 A. Okay.</p> <p>2 Q. In paragraph 86, you state that</p> <p>3 Dr. Rysman's concern might have more theoretical</p> <p>4 merit if directed against a rate proposal that was</p> <p>5 purely expressed as a percentage-of-revenue,</p> <p>6 correct?</p> <p>7 A. Yes, making the point that there are --</p> <p>8 the proposals have the minima that are -- address</p> <p>9 some of the issues he is concerned with.</p> <p>10 Q. Right. And you point to the fact that</p> <p>11 under the existing 115 rate structure and the</p> <p>12 proposal put forth by Google, there is a calculation</p> <p>13 of the greater of employing certain minimum</p> <p>14 payments, which you say protect the songwriters</p> <p>15 against the supposed risk arising from the</p> <p>16 uncertainty relating to the revenue of the streaming</p> <p>17 service, correct?</p> <p>18 A. Yes.</p> <p>19 Q. Are you saying, going back to your</p> <p>20 statements about sharing the upside, that the minima</p> <p>21 in the statute allow the Copyright -- Copyright</p> <p>22 Owners to "share the upside"?</p> <p>23 A. The minima?</p> <p>24 Q. Yeah.</p> <p>25 A. No, the minima would be protecting on the</p>

<p style="text-align: right;">5258</p> <p>1 downside.</p> <p>2 JUDGE STRICKLER: So if the minima</p> <p>3 applies, such as in this -- in a hypothetical</p> <p>4 situation where there's no revenue accruing to a</p> <p>5 service, then there is no sharing of the upside by</p> <p>6 the Copyright Owners? All they get is the minima?</p> <p>7 There's protection on the downside, but no sharing</p> <p>8 on the upside?</p> <p>9 THE WITNESS: I'm not sure I understand.</p> <p>10 If -- if --</p> <p>11 JUDGE STRICKLER: If you're a service</p> <p>12 that didn't -- that generated no revenue</p> <p>13 attributable to the service because it was --</p> <p>14 because it was bundled with other -- other related</p> <p>15 -- unrelated goods and services so that the minima</p> <p>16 applied, as counsel was suggesting --</p> <p>17 THE WITNESS: Right.</p> <p>18 JUDGE STRICKLER: -- as you point out,</p> <p>19 the minima protects the -- the Copyright Owners on</p> <p>20 the downside. Right?</p> <p>21 THE WITNESS: Yeah. I mean, this</p> <p>22 statement is about -- so a company that --</p> <p>23 JUDGE STRICKLER: Keep it general.</p> <p>24 THE WITNESS: Yeah, no, any company, but</p> <p>25 it's not really talking about this situation where</p>	<p style="text-align: right;">5260</p> <p>1 successful and they get a bunch of subscribers, then</p> <p>2 they benefit on the upside of that.</p> <p>3 Or, you know, if it's percent TCC and the</p> <p>4 sound recording themselves royalties are based on</p> <p>5 revenues and if there's an explosion in revenue,</p> <p>6 then that's going to work its way back to the</p> <p>7 copyright owner.</p> <p>8 JUDGE STRICKLER: So even the minima in</p> <p>9 this example creates some upside growth?</p> <p>10 THE WITNESS: Yeah, absolutely, sure.</p> <p>11 JUDGE STRICKLER: Thank you.</p> <p>12 BY MR. JANOWITZ:</p> <p>13 Q. At the end of paragraph 86 of your</p> <p>14 rebuttal report, after referring to the</p> <p>15 per-subscriber minima, you state that "therefore" --</p> <p>16 this is a quote -- "even Dr. Rysman's theoretical</p> <p>17 concerns about the transparency issues of service</p> <p>18 revenues are misguided."</p> <p>19 Dr. Leonard, how can the existence of</p> <p>20 minima or a minima, which is a default calculation,</p> <p>21 when, as in the case of Amazon, revenues are</p> <p>22 completely concealed, create transparency?</p> <p>23 A. No, I'm saying the concerns about</p> <p>24 transparency of revenues are addressed by this kind</p> <p>25 of minima.</p>
<p style="text-align: right;">5259</p> <p>1 there's problems of revenue definition. I think</p> <p>2 here we're into uncertainty about the Services'</p> <p>3 revenue because they might make a bad decision or</p> <p>4 something and that revenues decline unexpectedly. I</p> <p>5 think that's what this relates to.</p> <p>6 JUDGE STRICKLER: I didn't think it was,</p> <p>7 maybe I'm wrong, but I thought -- I mean, if it</p> <p>8 wasn't the question, so now it's my question.</p> <p>9 THE WITNESS: Okay. Sure. Yeah.</p> <p>10 JUDGE STRICKLER: Which is that if a</p> <p>11 service by its very nature generates no revenues --</p> <p>12 THE WITNESS: Right.</p> <p>13 JUDGE STRICKLER: -- so that a</p> <p>14 per-subscriber minima or some other subminima would</p> <p>15 apply --</p> <p>16 THE WITNESS: Okay.</p> <p>17 JUDGE STRICKLER: -- that protects the</p> <p>18 Copyright Owners on the downside. That's why it's a</p> <p>19 minima. It's a floor. But they no longer share in</p> <p>20 the upside, if that's the business model of the --</p> <p>21 of the -- of the service to generate no revenues.</p> <p>22 THE WITNESS: Well, I don't know if I</p> <p>23 would agree with that. What if there's an</p> <p>24 explosion -- so let's say the per-subscriber minimum</p> <p>25 applies and there's -- the service is wildly</p>	<p style="text-align: right;">5261</p> <p>1 Q. By "transparency," you mean the ability</p> <p>2 to see what's going on, right, in the -- in the</p> <p>3 calculation of the -- of the revenues, correct?</p> <p>4 A. Well, let's take -- sorry, are we closed?</p> <p>5 JUDGE STRICKLER: Open.</p> <p>6 MR. JANOWITZ: You know what, let me</p> <p>7 withdraw the question.</p> <p>8 THE WITNESS: Okay.</p> <p>9 BY MR. JANOWITZ:</p> <p>10 Q. I gather that perhaps what you mean by</p> <p>11 transparency is that the Copyright Owners will know,</p> <p>12 even before a single stream has been created,</p> <p>13 exactly what they will receive, correct?</p> <p>14 A. No, I think -- so I'll just talk</p> <p>15 hypothetically. The transparency I'm talking about</p> <p>16 here is a situation where it's not clear what</p> <p>17 revenue could be attributable to the music part of</p> <p>18 the service, that there's, you know, difficulties</p> <p>19 because it's, for instance, bundled with something</p> <p>20 else. And all I'm saying is that that's a situation</p> <p>21 where the other prongs come into play or can come</p> <p>22 into play, and so the lack of transparency -- and so</p> <p>23 earlier I talked about the various ways this could</p> <p>24 be addressed with, and I'm saying here that the</p> <p>25 minima prong are ways to deal with this exact issue.</p>

<p style="text-align: right;">5262</p> <p>1 Q. So you're not saying that it's 2 transparent; you're saying that the lack of 3 transparency is dealt with in another way? 4 A. The lack of transparency in revenue is 5 addressed by having these minima that are based on 6 something else, namely number of subscribers or TCC. 7 JUDGE STRICKLER: Well, it's addressed 8 and -- the problem of the lack of transparency and 9 potential hiding, if you will, of revenue is 10 addressed and ameliorated by the existence of the 11 minima, but until you would reach a revenue 12 threshold that would trigger these minima, there's 13 room for all sorts of shenanigans, shall we say, 14 with regard to revenue concealment, theoretically or 15 hypothetically, until you hit that point. So you 16 can get -- you can get away with it as long as you 17 can, but once you hit the threshold, game over. So 18 you've ameliorated the problem, mitigated the 19 problem, but not eliminated the problem? 20 THE WITNESS: Well, I suppose you could, 21 of course, set -- that can be addressed in ways that 22 you set the -- the minima. You know, I think 23 the percent TCC, again, if you set -- I mean, this 24 is true of the subscriber too, but if you set the 25 number correctly, I mean, I think that that can be</p>	<p style="text-align: right;">5264</p> <p>1 economic result of being the equivalent of 2 opportunism, but -- but there's no nefarious intent. 3 It's a business structure that -- that might happen 4 to result in -- in the movement of revenue away from 5 the -- from the music service? 6 THE WITNESS: Well, it's not even a 7 movement. It's just I'm offering this bundle, 8 right, the bundle has music in it. I haven't moved 9 anything anywhere. It's just my business model. 10 And as a result of that, it does create 11 an issue where it's hard to identify a specific 12 revenue. We could try. We can do the imputed 13 revenue unbundling type thing -- 14 JUDGE STRICKLER: Didn't we talk about 15 that when you were here on direct? I feel like we 16 did. How to -- how to unbundle? 17 THE WITNESS: Yeah, and we talked about 18 it a little earlier today. You could -- you could 19 try to do that, just like, I guess, there's a part 20 of Subpart C currently that talks about some 21 percentage, I think, of revenue that gets -- that 22 you could unbundle. 23 Alternatively, you could use the minima 24 and try to get the numbers right there, numbers that 25 would -- would do the job.</p>
<p style="text-align: right;">5263</p> <p>1 -- that can be dealt with here. 2 The other thing I would say is, just 3 going back to opportunistic, I just want to be clear 4 what I meant about that. Opportunistic is what 5 you're talking about -- the service is sitting there 6 saying if all I do is I just stick the money over 7 here and I hide it here and I don't put it here -- 8 when I said there's no evidence of that, I mean, I 9 literally have seen no evidence that that's what's 10 going on. 11 I think there are issues, legitimate 12 business issues, about, okay, we charge whatever we 13 charge for Amazon Prime, music is part of that, but 14 it's hard to decide how much. I mean, that's just 15 sort of a result of the business. There's no 16 opportunism going on there. It's business choices 17 that Amazon made and completely legitimate, but it 18 does create a problem for us here. I'm not denying 19 that. 20 I am just objecting to the use of the 21 word "opportunistic" with regard to what Amazon is 22 doing, for instance. 23 JUDGE STRICKLER: When you say -- when 24 you challenge opportunistic, it's the intentional 25 aspect of it that's bothering you. It may have the</p>	<p style="text-align: right;">5265</p> <p>1 JUDGE STRICKLER: Thank you. 2 BY MR. JANOWITZ: 3 Q. Dr. Leonard, talking about the minima, in 4 -- in the case of Google's proposal, which you 5 assert has minima built into its proposal, under the 6 Google proposal there will be no mechanical-only 7 floor, correct? 8 A. That's correct. There's -- you know, the 9 other thing to create a floor for all-in -- 10 Q. Right. And -- 11 A. -- payments for musical works. 12 Q. And you -- and you would argue that the 13 Copyright Owner, under Google's proposal without the 14 mechanical floor, can rely on the subminimum, 15 correct? 16 A. Yes. Again, you know, if we -- I agree 17 we have to think about what the right numbers to 18 stick in there are, but, yes. 19 Q. So Google would remove the 50 cent 20 mechanical-only floor and then ask the Copyright 21 Owners to rely on the subminimum, only the 22 subminimum is now going to be less than it was 23 before, right, under Google's proposal? 24 A. It's going to be less to accord with -- I 25 mean for TCC, it's less. For the per-subscriber,</p>

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<p style="text-align: right;">5266</p> <p>1 dollar per-subscriber minimum is the same, I 2 believe. The percent TCC, Google is proposing a 3 lower number. And I was -- as I talked about when I 4 was here before, that's consistent with, you know, 5 the lower corresponding percentage in Subpart A 6 PDDs. 7 Q. And the TCC would be paid only as a 8 lesser of calculation as compared to the 80 cents 9 per subscriber per month, correct? 10 A. It would be, yes, as a lesser of, right. 11 Q. And in paragraph 108 of your rebuttal 12 report, you point out to what I suppose could be a 13 -- could be considered a hazard of the increase in 14 mechanical royalties. You point out that if there 15 was such an increase in mechanical royalties, the 16 number of songwriters might increase, but that they 17 would likely be the marginal songwriters in terms of 18 songs, quality of songs, correct? Do you remember 19 that? 20 A. Yes. 21 Q. And you say that the high-quality 22 songwriters are already writing songs given current 23 incentives? 24 A. Yes, that's what you would expect. 25 Q. Can you explain to us what a high-quality</p>	<p style="text-align: right;">5268</p> <p>1 music in an academic way, correct? 2 A. I haven't written a paper that concerns 3 music specifically, no. 4 Q. Have you -- have you studied -- have you 5 received a degree in music or music finance? 6 A. Oh, no. No, I have not. 7 Q. Have you ever taken a music course? 8 A. Not from college onward. Perhaps before. 9 Q. Okay. Now, beginning at paragraph 115 of 10 your written rebuttal statement -- by the way, in 11 terms of, you know, your conclusions about 12 high-quality music, have you done any empirical 13 study of this? 14 A. Well, I am aware of -- I don't know what 15 you mean by empirical study. I -- 16 Q. Sure. Have you collected data and done, 17 you know, an analysis the way an economist does an 18 analysis? 19 A. Well, I certainly reviewed the record 20 here, and I've reviewed academic literature. I'm 21 quite familiar with the idea that, as in a lot of 22 things, there's -- you know, it's a situation of a, 23 you know, long tail. There's, you know, relatively 24 few, you know, very successful artists, very 25 successful songs, and then, you know, a long tail of</p>
<p style="text-align: right;">5267</p> <p>1 songwriter is? 2 A. Sure. A high-quality songwriter is -- as 3 I mentioned before, is somebody who's writing 4 something that ultimately has more appeal than a 5 lower quality songwriter. 6 Q. And in order to be a high-quality 7 songwriter, does a composer have to be commercially 8 successful? 9 A. I don't think in order to be. The 10 quality in this case is something I think is -- that 11 is inherent to the person. Like if I tried to write 12 a song, I'm -- I'm afraid the results would not be 13 particularly good, but there are other people who 14 are, you know, much better than I. 15 Q. Dr. Leonard, you've never testified in a 16 case involving music royalties before, have you? 17 A. No, I have not. 18 Q. And you've never written a paper about 19 music royalties, have you? 20 A. I have not. 21 Q. And this is the first engagement in which 22 you've been asked to testify as an expert in 23 connection with music royalties; isn't that correct? 24 A. I believe that's correct, yes. 25 Q. And you don't have -- you haven't studied</p>	<p style="text-align: right;">5269</p> <p>1 much less successful ones. It's similar to a lot 2 superstar-type situations, which I have written 3 about. 4 So I am quite familiar with that. 5 JUDGE FEDER: Have I reviewed the 6 testimony of any of the songwriters who appeared 7 before us? 8 THE WITNESS: I think I did take a look 9 at them at one time, but I didn't review their -- 10 their testimony here. 11 BY MR. JANOWITZ: 12 Q. Now, you've also addressed criticisms to 13 Dr. Gans' work, correct? 14 A. Yes. 15 Q. And beginning at paragraph 115 of your 16 written rebuttal statement, you provide very 17 specific criticisms of Dr. Gans' expert report, 18 correct? 19 A. Yes, I guess so. 20 Q. And your first criticism of Dr. Gans' 21 opinions and his Shapley value analysis is based on 22 the assumption, his assumption, that sound recording 23 rights and musical work rights have equal value, 24 correct? 25 A. That's -- yes, I do dispute that.</p>

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<p>5270</p> <p>1 Q. You point out that Professor Gans 2 believes these two rights are perfect complements, 3 correct? 4 A. Well, they are perfect complements. 5 Q. You're saying they are perfect 6 complements? 7 A. Well, so at the point where, again, 8 somebody needs the copyrights, at that point in 9 time, they are perfect complements in the sense that 10 you need both of them at that point in time. Now, 11 that doesn't mean they are of equal value, though. 12 Q. Now, just following up on your answer, 13 take a look at the -- at paragraph 115 beginning at 14 the bottom, next to the last line. "For example, 15 Dr. Gans claims it is easy to draw parallels between 16 sound recording rights and musical work rights. One 17 right cannot hold any value absent the other right, 18 and the value of sound recording rights and musical 19 work rights for interactive streaming are equal 20 because these two rights are perfect complements to 21 one another." 22 Do you see that? 23 A. Yes. 24 Q. And then you say, "However, Dr. Gans 25 presents no support for this crucial assumption."</p>	<p>5272</p> <p>1 covered by that specific patent using other 2 technologies? And if so, then that -- that 3 particular patent isn't worth a lot. Others, that 4 may not be true. That may have been the only way to 5 do that part of the standard. That one should get a 6 lot more money. 7 : : : And that's really what I'm talking about 8 here, is let's go back to the time when the artist 9 decided to make this recording. What -- what song 10 choices did they have from the songwriter's 11 perspective? What artist could they have sold this 12 thing to? And, you know, again, I think if you 13 think about it, the artists are really driving the 14 bus here and should get more relative value. Not 15 that the songwriters are worth nothing. I'm not 16 saying that at all. But they certainly aren't of 17 equal value. 18 Q. All right. And have you been able to 19 measure that inequality? 20 A. Yeah, I think the Subpart A does that 21 quite nicely. 22 Q. Have you done it? Have you done any 23 empirical analysis and collected data that shows 24 what the difference is between the value of what a 25 songwriter puts into a song versus the artist who</p>
<p>5271</p> <p>1 And -- and that was the assumption, wasn't it, that 2 they are perfect complements? 3 A. No, that they are of equal value. So 4 it's very similar to a situation that is, you know, 5 very popular right now, if I can call it that, in 6 the standard essential patent area. Once you've set 7 a standard, you have a group of patents that are 8 essential to that standard. At that point, they are 9 perfect complements for each other. You need all of 10 them to implement the standard. 11 But I think as widely acknowledged now -- 12 I hope at least anyway; I've done a lot of work in 13 this area -- is that not all those patents are of 14 equal value. Some are very important for the 15 standard, and some weren't that important because 16 when the standard was set there were a lot of 17 different technologies that could have been used to 18 solve that particular problem. Other -- other 19 patents, that wouldn't have been the case. 20 So although at the point where somebody 21 needs to implement the standard they are perfect 22 complements, to value them, to figure out what the 23 right royalties are, we need to go back and ask were 24 there substitutes or not? Were there other ways to 25 have achieved that aspect of the standard that's</p>	<p>5273</p> <p>1 performs it? 2 A. Well, I think I talk about a bunch of 3 factors here. I wouldn't call that an empirical or 4 econometric analysis, but it's certainly looking 5 at -- 6 Q. Right. 7 A. -- at the market data and -- 8 Q. You have some speculation on this point? 9 A. It's not speculation. 10 Q. Popular artists, you say, contribute more 11 value than songwriters and thus would be expected to 12 capture a larger share of the profits from royalties 13 in a market outcome. What is your data for that? 14 A. That the labels, again, have a higher -- 15 you know, the artists and labels together make -- 16 get a larger share of the value than songwriters. 17 Q. Are you aware that certain songs are 18 what's called covered? Do you know what a cover of 19 a song is? 20 A. Yes, sure. 21 Q. So it comes out, there may be somebody 22 who sings it originally -- 23 A. Right. 24 Q. -- and then another person sings the same 25 song?</p>

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<p style="text-align: right;">5274</p> <p>1 A. Sure.</p> <p>2 Q. -- and can do so because of the existence</p> <p>3 of the compulsory license, and maybe five more sing</p> <p>4 it and maybe ten more sing it and maybe 20 more sing</p> <p>5 it, and there are lots of successful examples of it.</p> <p>6 Does that indicate to you that that song itself is</p> <p>7 of great value?</p> <p>8 A. Again, there can be songs that are a lot</p> <p>9 more valuable than other songs, but I think at the</p> <p>10 end of the day here, all I'm saying is that, you</p> <p>11 know, artists are -- you know, I'm not saying the</p> <p>12 songwriters aren't contributing anything. Far from</p> <p>13 it. But in terms of relative value, the artists are</p> <p>14 contributing more, and so Dr. Gans' assumption that</p> <p>15 they should -- that they are of equal value is just</p> <p>16 not, in my view, correct.</p> <p>17 Q. Except when it comes to actually having</p> <p>18 to record the song or to use the song on a streaming</p> <p>19 service; isn't that right? When the streaming</p> <p>20 service wants to use the song, it can't negotiate,</p> <p>21 it can't decide what is more valuable; it has to pay</p> <p>22 both the songwriter and the record company for the</p> <p>23 performance, correct?</p> <p>24 A. It does. But that's what we're here to</p> <p>25 determine is not to assume that they have equal</p>	<p style="text-align: right;">5276</p> <p>1 data for your opinion?</p> <p>2 A. Well, this is just making the example,</p> <p>3 which I don't think is in the least bit disputed, in</p> <p>4 fact, I think it's well established, that screen</p> <p>5 writers, who are analogous in some sense to the</p> <p>6 songwriter, is -- you know, make a lot less money</p> <p>7 than the stars of the film, who are analogous to the</p> <p>8 artist. So who's driving things in that industry?</p> <p>9 It's the -- the artist, not the -- the screen</p> <p>10 writer.</p> <p>11 And it's not to say that there aren't</p> <p>12 some situations where a screen writer could make a</p> <p>13 lot of money, maybe even more than the stars of the</p> <p>14 film. I don't know, but on average it's clearly the</p> <p>15 case that stars make more money than -- than the</p> <p>16 screen writers.</p> <p>17 Q. And you -- and you point out -- you quote</p> <p>18 Bill Mechanic, who's the former chairman of 20th</p> <p>19 Century Fox, who said that without Tom Hanks, this</p> <p>20 movie wouldn't have performed the way it did, right?</p> <p>21 A. His incremental contribution is very</p> <p>22 large. If you had a different screen writer write</p> <p>23 the script, would it really have changed the outcome</p> <p>24 of that nearly as much as Tom Hanks? I doubt it.</p> <p>25 Q. And you're familiar, aren't you -- and</p>
<p style="text-align: right;">5275</p> <p>1 value and say that the payment should -- should be</p> <p>2 in line with that but instead just say, at least in</p> <p>3 part, what -- what are the relative contributions?</p> <p>4 That's one of the very 801(b)(1) factors. If that</p> <p>5 wasn't an issue, if it was just clearly 50/50, why</p> <p>6 doesn't the statute just say that?</p> <p>7 Q. So I looked at YouTube recently. And I</p> <p>8 saw that Bruce Springsteen performed a cover of a</p> <p>9 Bob Dylan song, "Blowin' in the Wind." What's more</p> <p>10 valuable in that, Springsteen's performance or Bob</p> <p>11 Dylan's creation of the song?</p> <p>12 A. Well, you know, again, we can always look</p> <p>13 at examples and, you know, and there are certainly</p> <p>14 contexts where a song itself is going to be -- you</p> <p>15 know, have a lot of value. I'm not saying that.</p> <p>16 But we -- but we're -- at a rate setting like this,</p> <p>17 we've got to look overall on average. And overall</p> <p>18 on average, again, the artist and the sound</p> <p>19 recording is, in my view, contributing more value</p> <p>20 than the songwriter. Again, properly valued,</p> <p>21 evaluated at the time when there was flexibility for</p> <p>22 each side to -- to choose.</p> <p>23 Q. And looking at paragraph 117 of your</p> <p>24 report where you refer to Tom Hanks who appears in</p> <p>25 the movie called Castaway, do you consider that good</p>	<p style="text-align: right;">5277</p> <p>1 you're familiar, aren't you, with the fact that</p> <p>2 there are famous flops, famous movies that are flops</p> <p>3 that star, famous actors, Johnny Depp in the Lone</p> <p>4 Ranger, Eddie Murphy in the Adventures of Pluto</p> <p>5 Nash, Brad Pitt in Alexander, Jackie Chen, Around</p> <p>6 the World in 80 Days? You're aware of that, aren't</p> <p>7 you?</p> <p>8 A. Absolutely. I mean, look, things can be</p> <p>9 successful, they can be not successful. Again, we</p> <p>10 have to look at it from the point of view of what's</p> <p>11 more likely to make -- what's making a bigger</p> <p>12 contribution to its -- its success if it is</p> <p>13 successful. And, again, that's the -- in that case,</p> <p>14 the star; here it's the artist. Again, they</p> <p>15 couldn't -- you know, if there were no songs to</p> <p>16 record, obviously that's an issue. That's why the</p> <p>17 songwriters do deserve something. They're making a</p> <p>18 contribution. But it is a question: Are they</p> <p>19 making an equal contribution? And I just don't</p> <p>20 think the evidence is consistent with that.</p> <p>21 MR. JANOWITZ: I have no further</p> <p>22 questions.</p> <p>23 JUDGE BARNETT: Thank you, Mr. Janowitz.</p> <p>24 If it's a good time for us to take our morning</p> <p>25 recess, we will do so. 15 minutes.</p>

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<p style="text-align: right;">5278</p> <p>1 (A recess was taken at 10:42 a.m., after 2 which the hearing resumed at 11:05 a.m.) 3 JUDGE BARNETT: Please be seated. 4 Counsel, the -- the answer to the 5 question you've all been waiting for, we need the 6 six weeks. We need the schedule to stay at six 7 weeks. But we're perfectly happy with four and two 8 or five and one if that's the way you decide to go. 9 But we have to stick with the six weeks. 10 So the record is clear, we're talking 11 about proposed findings and conclusions. And reply 12 findings and conclusions. With respect to the 13 replies, number the reply paragraphs with the same 14 number as the paragraph to which you are replying. 15 A reply is not to restate your case, not to argue. 16 It's simply to reply to the other side's proposal 17 and to cite with specificity what it is you're 18 replying to so that we can -- if we don't see a 19 number in your reply, we'll know that you're not 20 contesting or arguing or whatever with regard to the 21 missing paragraph. 22 And, Judge Strickler? 23 JUDGE STRICKLER: Yes, with regard to 24 proposed findings and conclusions, apropos to that, 25 I just want to remind you, counsel, of what I'm sure</p>	<p style="text-align: right;">5280</p> <p>1 REDIRECT EXAMINATION 2 BY MR. WETZEL: 3 Q. Dr. Leonard, do you recall this morning 4 when you were discussing your Subpart A analysis, 5 Mr. Janowitz asked you whether you performed an 6 empirical analysis of the relative contributions of 7 songwriters and recording artists? 8 A. Yes. 9 Q. And you were in the process of 10 responding, "well, I think I talked about a bunch of 11 factors here and I wouldn't call it an empirical or 12 econometric analysis, but it certainly, looking at 13 market data and" -- at which point Mr. Janowitz 14 interjected with a question about speculation, to 15 which you disagreed. 16 Do you recall that? 17 A. Yes, I do. 18 Q. Could you please finish your explanation 19 of how your benchmark analysis is informative of the 20 relative contributions of songwriters and artists? 21 A. Yes. So, I mean, it's market data and 22 facts that you look at where parties negotiated over 23 exactly this split and -- the Subpart A split. It's 24 clearly not equal value to publishers and to -- and 25 to labels.</p>
<p style="text-align: right;">5279</p> <p>1 you already know, it's in the regulations, section 2 351.4(a) -- excuse me, .4(b)(3), the last sentence 3 says: "No party will be precluded from revising its 4 claim or its requested rate at any time during the 5 proceeding up to, and including, the filing of the 6 proposed findings of fact and conclusions of law." 7 That's all I have to say about that. 8 MR. ZAKARIN: Your Honor, if I can, we 9 haven't talked -- we will talk -- and as long as we 10 stay within the six weeks, I gather that the Court 11 is less concerned about whether we do it three and a 12 half weeks, four weeks, as long as we end on the end 13 date? 14 JUDGE BARNETT: That's exactly right. 15 MR. ZAKARIN: So we'll discuss among 16 ourselves and figure out what works. Thank you, 17 Your Honors. 18 JUDGE BARNETT: Thank you for promoting 19 us to a Court. We always appreciate it. 20 And just off the record. 21 (Discussion off the record.) 22 JUDGE BARNETT: Mr. Wetzel? 23 MR. WETZEL: Yes, I just have -- have a 24 brief redirect, Your Honor. 25</p>	<p style="text-align: right;">5281</p> <p>1 Q. What about the circumstances of the 2 negotiation of the Subpart A rate led you to believe 3 that it was reflective of the relative contributions 4 that we are seeking to assess in the context of this 5 proceeding? 6 A. It was a settlement and it was a 7 negotiation between, as I understand it, publishers 8 and labels. So they were deciding how to split 9 things up, and that was the outcome of that -- that 10 settlement was an outcome of that. 11 Q. Okay. Now I want to go to the part of 12 the morning's discussion when Judge Barnett asked 13 you about the issue of revenue deferment and you 14 mentioned the possibility discussed by Dr. Katz of 15 publishers smoothing the problem. Do you recall 16 that? 17 A. Yes. 18 Q. Can I direct you to paragraphs 89 and 90 19 of your written rebuttal statement. And, in 20 particular, the last couple sentences of paragraph 21 90, footnote 137. 22 A. Yes. I mean, I talked about this too in 23 my -- my report, but I was here when I think I heard 24 Dr. Katz mention specifically, but, yeah, I say 25 publishers could take it upon themselves to</p>

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<p>5282</p> <p>1 reallocate royalties inter-temporally so as to 2 smooth payments to songwriters over time. This is, 3 in fact, actually done in the form of advance 4 payments that are made by publishers to songwriters, 5 so there's a bit of -- of that already in what 6 publishers do. 7 Q. And in footnote 37, in the last few 8 sentences, it reads, "in return the publisher pays 9 the songwriter an advance at the beginning of the 10 contract which is recoupable against the writer's 11 royalties. Additional advance payments are usually 12 due if the publisher exercises options to extend the 13 contract." 14 Can you explain what you're referring to 15 there? 16 A. So this is -- these are contracts between 17 publishers and songwriters. And they specify these 18 kind of advance payments. A publisher makes a 19 payment to the songwriter at the beginning of the 20 contract or if it's extended. And then to the 21 extent royalties would otherwise be due to the 22 songwriter, it gets subtracted -- they basically get 23 subtracted, well. The publisher keeps it until you 24 get to a point where the royalties exceed the 25 advance, and then it would get paid out to the</p>	<p>5284</p> <p>1 THE WITNESS: Thank you. 2 JUDGE STRICKLER: Before this witness 3 begins, do we know what the rest of the lineup is in 4 terms of the order of witnesses? 5 MR. ELKIN: I think Mr. Klein is after 6 Mr. Vogel. 7 JUDGE STRICKLER: After Mr. Klein? 8 MR. WEIGESNBERG: And I believe 9 Dr. Leslie Marx will return for rebuttal tomorrow. 10 MR. MANCINI: That's correct. 11 JUDGE STRICKLER: So the next economic 12 expert coming up is Dr. Marx, not Dr. Hubbard? 13 MR. SEMEL: Correct. I believe 14 Dr. Hubbard is the last witness. 15 MR. MANCINI: Your Honors, Spotify would 16 like to call Mr. Paul Vogel as our next witness. 17 JUDGE BARNETT: Mr. Vogel, I don't think 18 you can raise your right hand. 19 MR. VOGEL: I cannot. 20 JUDGE BARNETT: In any event. 21 Whereupon-- 22 PAUL VOGEL, 23 having been first duly sworn, was examined and 24 testified as follows: 25 JUDGE BARNETT: Please be seated.</p>
<p>5283</p> <p>1 songwriter. If they don't make it, then my 2 understanding is the songwriter keeps the money. 3 JUDGE FEDER: And just to clarify the 4 record, we're talking about footnote 137? 5 THE WITNESS: Yes, correct. 6 JUDGE FEDER: The transcript said 37. 7 MR. WETZEL: Thank you. 8 BY MR. WETZEL: 9 Q. As an economist, and based on the 10 testimony you've seen at the trial, what effect, if 11 any, do you believe a songwriter having written a 12 hit song would have on whether a publisher chooses 13 to exercise the option you were just discussing or 14 on a subsequent advance payment made to the 15 songwriter in the new contract from the publisher? 16 A. Well, having a hit song is a signal, 17 although not a perfect one, of course, that the 18 songwriter will do -- will write hit songs in the 19 future. And, you know, so you would expect that 20 there's going to be competition for such songwriters 21 and they would get paid bigger advances and more 22 money in general. 23 MR. WETZEL: Thank you. I have no 24 further questions. 25 JUDGE BARNETT: Thank you, Dr. Leonard.</p>	<p>5285</p> <p>1 MR. MANCINI: Your Honors, can I just 2 begin on one point? Your Honors, before we begin, I 3 want to remind the Panel that the Copyright Owners 4 and Services have agreed that Mr. Vogel, due to his 5 surgery, can appear once in this proceeding. 6 Although he submitted both a written direct 7 testimony and a written rebuttal testimony, he will 8 be testifying live today as to both. 9 JUDGE BARNETT: Thank you. 10 JUDGE STRICKLER: With the one available 11 arm, he wouldn't be able to testify as an economist? 12 MR. MANCINI: Yes, but we also have a 13 favor to ask. We would like to place one of our 14 associates next to him to turn the pages in the 15 binders, if that would be permissible. 16 JUDGE BARNETT: Certainly. 17 MR. MANCINI: Thank you. 18 THE WITNESS: Thank you. 19 MR. SEMEL: And if I may just quickly, 20 Your Honors, hopefully a minute to save more than a 21 minute. While my colleague Mr. Weigensberg will be 22 handling the cross, this witness -- you may recall a 23 couple weeks ago, we had an evidentiary question 24 with Mr. McCarthy, and there was a question about 25 another witness coming. As we understand it, this</p>

<p>5286</p> <p>1 is that witness. 2 And we do have some similar foundational 3 questions of evidence, but we would propose to use 4 the similar proceeding we used before to speed 5 things along, which is we'll note the objections on 6 the record, we'll have an opportunity to cross on 7 foundation; as to the testimony, just a standing 8 objection so we're not objecting to every question. 9 And then if at the end there's still open questions, 10 we would submit briefly to you those issues. 11 JUDGE BARNETT: Thank you. 12 MR. MANCINI: If I may just address those 13 briefly, because I'm hopeful that after today, they 14 will decide the better of filing a motion, but if I 15 may -- if I may just make a few points. 16 I think as Your Honors will recall from 17 the testimony of Mr. McCarthy, the primary objection 18 they had was lack of foundation. The testimony that 19 you will hear from Mr. Vogel, we think, will satisfy 20 that but, more importantly, I think it's important 21 to note for the record all of the sources relied 22 upon by Mr. Vogel were produced, in fact, produced 23 within five days of each other. And we can cite the 24 Panel chapter and verse. 25 In addition, to aid the Copyright Owners,</p>	<p>5288</p> <p>1 DIRECT EXAMINATION 2 BY MR. MANCINI: 3 Q. Mr. Vogel, where are you currently 4 employed? 5 A. I work at Spotify. 6 Q. And what is your position there? 7 A. I'm vice president, head of financial 8 planning and analysis and investor relations. 9 Q. And when did you join Spotify? 10 A. I joined about ten months ago. 11 Q. And where were you previously employed? 12 A. I was at Barclays. 13 Q. Where were you employed previous to 14 Barclays? 15 A. Prior to that, I worked at OpenSky. 16 Q. And what is your educational and 17 financial training? 18 A. I have a BA at the University of 19 Pennsylvania, and I have a designation of a charter 20 financial analyst. 21 Q. And as the head of global financial 22 planning and analysis for Spotify, what are your 23 responsibilities? 24 A. I help plan our forecasting models for 25 how the business is going to do.</p>
<p>5287</p> <p>1 we didn't think that was necessary, we even added 2 column headings to make it clear so they can 3 understand from our documents. Furthermore, they 4 never asked for Mr. Vogel's deposition. They never 5 served an interrogatory asking these questions about 6 how the information was derived. In fact, they 7 could have served interrogatories. We did. In 8 fact, we sent an interrogatory to them to ask very 9 similar types of calculations. 10 Furthermore, we think this argument has 11 been waived. There was no motion in limine filed. 12 They did not serve a notice of a deposition on 13 Mr. Vogel, despite having one remaining deposition 14 of their ten. 15 Notwithstanding all of that, we are 16 hopeful after they hear today piece by piece how 17 this calculation was done, which was simple math, 18 that they will think the better of a motion on this 19 issue. 20 JUDGE BARNETT: Thank you, Mr. Mancini. 21 And if they don't think better, we'll hear all of 22 that -- we'll read all of that again in your written 23 submittal. 24 MR. MANCINI: Thank you, Your Honor. 25</p>	<p>5289</p> <p>1 Q. NS within those responsibilities, do you 2 model the effect of variables in Spotify's cost 3 structure and profitability? 4 A. I do. 5 Q. And is one of those variables the impact 6 of changes on royalty rates? 7 A. It is. 8 Q. And have you had occasion to model the 9 effects of royalty rate changes on Spotify's cost 10 structure and profitability? 11 A. I have. 12 Q. And, in fact, have you modeled the impact 13 of proposed changes in this proceeding on Spotify's 14 cost structure and profitability? 15 A. I have. 16 Q. Did you submit a written direct testimony 17 in this proceeding? 18 A. I did. 19 Q. And I believe you have a binder before 20 you. I would ask you to turn your attention to 21 Spotify Trial Exhibit 1062. 22 MR. MANCINI: Sorry, can we go back on 23 the original slide? Thank you. We're still in 24 open. 25 BY MR. MANCINI:</p>

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<p>5290</p> <p>1 Q. Is that a copy of the written direct 2 testimony that you submitted in this proceeding? 3 A. It is. 4 Q. With assistance, can I ask you to turn to 5 the last page of that document. 6 A. Yes. 7 Q. Is that a copy of your signature on the 8 written direct testimony? 9 A. It is. 10 Q. And are all of the statements made 11 therein true and correct to the best of your 12 information and belief? 13 A. They are. 14 MR. MANCINI: Your Honors, I'd like to 15 move Spotify Trial Exhibit 1062 into evidence. 16 MR. WEIGENBERG: I'm just going to note 17 our standing objection. 18 JUDGE BARNETT: Noted. 1062 is admitted, 19 subject to that objection. 20 (Pandora Exhibit Number 1062 was marked 21 and received into evidence.) 22 BY MR. MANCINI: 23 Q. Mr. Vogel, did you also have occasion to 24 file a written rebuttal statement in this 25 proceeding?</p>	<p>5292</p> <p>1 Q. And are those up on the screen? 2 A. Yes. 3 MR. MANCINI: At this point, Your Honor, 4 we're going to begin in restricted session. 5 JUDGE BARNETT: Anyone in the hearing 6 room who is not authorized to view restricted 7 material or confidential information, please wait 8 outside. 9 (Whereupon, the trial proceeded in 10 confidential session.) 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p>5291</p> <p>1 A. I did. 2 Q. I'm going to ask you to turn your 3 attention, again with assistance, to Spotify Trial 4 Exhibit 1060. I'm sorry, 1068. Is that a copy of 5 your written rebuttal testimony in this proceeding? 6 A. It is. 7 Q. And I'll ask you to turn your attention 8 to the last page of that document. Does that 9 contain your signature? 10 A. It does. 11 Q. And are all the statements in that 12 written rebuttal testimony true and correct to the 13 best of your information and belief? 14 A. They are. 15 MR. MANCINI: We'd like to move Spotify 16 Trial Exhibit 1068 into evidence. 17 MR. WEIGENBERG: Same note, Your Honor. 18 JUDGE BARNETT: Same -- same acceptance, 19 with the same note. 20 (Pandora Exhibit Number 1068 was marked 21 and received into evidence.) 22 BY MR. MANCINI: 23 Q. Did you also prepare a set of 24 demonstratives to aid your testimony today? 25 A. I did.</p>	<p>5360</p> <p>1 OPEN SESSION 2 AFTERNOON SESSION 3 (1:32 p.m.) 4 MR. MANCINI: Your Honor, we only have a 5 few minutes of redirect of Mr. Vogel, and my 6 associate, Mr. Schmidt, will perform it. 7 JUDGE BARNETT: Thank you. 8 REDIRECT EXAMINATION 9 BY MR. SCHMIDT: 10 Q. Good afternoon, Mr. Vogel. 11 A. Thank you. 12 Q. Can I ask you to turn to Exhibit 1041. 13 That's, again, the document with the registered 14 users and streams, and around the seventh page where 15 the streams start. 16 A. Yes. 17 Q. I want to clear up a little bit how 18 these, how this data was combined to get the numbers 19 in your report. Did your team, for example, add all 20 the rows with CRB_tier equals paid for a given month 21 to get total streams for that month? 22 MR. WEIGENBERG: Objection, leading. I 23 recognize that we have allowed some leading 24 questions on redirect in this proceeding, but I 25 really feel like this is handing the witness the</p>

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<p>5361</p> <p>1 answer.</p> <p>2 JUDGE BARNETT: Overruled.</p> <p>3 THE WITNESS: They did.</p> <p>4 BY MS. SCHMITT:</p> <p>5 Q. And did you do the same for the</p> <p>6 ad-supported tier, adding up the rows with CRB_tier</p> <p>7 equals free?</p> <p>8 A. Yes.</p> <p>9 Q. And could there be multiple rows, for</p> <p>10 example, for CRB_tier equals paid because there were</p> <p>11 in the underlying database other fields irrelevant</p> <p>12 for this purpose?</p> <p>13 A. Yes.</p> <p>14 Q. And is that a common occurrence in</p> <p>15 pulling data from databases in your experience at</p> <p>16 Spotify?</p> <p>17 A. Yes.</p> <p>18 Q. And did you review the results of</p> <p>19 combining these streams to get total streams?</p> <p>20 A. Yeah, the consolidated results, yes.</p> <p>21 Q. Did you calculate as part of your team's</p> <p>22 analysis the number of average monthly streams per</p> <p>23 paid user based on these results?</p> <p>24 A. Yes.</p> <p>25 Q. And did you similarly calculate the</p>	<p>5363</p> <p>1 results of your analysis?</p> <p>2 A. Yes.</p> <p>3 Q. And do you generally rely on your team to</p> <p>4 pull these kinds of numbers from large and disparate</p> <p>5 databases into usable Excel files?</p> <p>6 A. I do.</p> <p>7 Q. And is one of those files what is</p> <p>8 reproduced as this exhibit that we just looked at?</p> <p>9 A. Yes.</p> <p>10 Q. And is it your understanding --</p> <p>11 MR. WEIGENSBERG: I just want to launch</p> <p>12 one objection because I don't believe that it was</p> <p>13 his testimony during the cross, and I think it is</p> <p>14 implicit in Mr. Schmidt's question that his team</p> <p>15 actually pulled together the spreadsheet.</p> <p>16 My objection is that I think it misstates</p> <p>17 his testimony.</p> <p>18 MR. SCHMIDT: Your Honor, if I may.</p> <p>19 JUDGE BARNETT: Yes, please.</p> <p>20 MR. SCHMIDT: I simply asked does his</p> <p>21 team generally do these types of things.</p> <p>22 MR. WEIGENSBERG: So long as he is not</p> <p>23 asking with reference to the specific spreadsheet, I</p> <p>24 am fine with that.</p> <p>25 JUDGE BARNETT: Thank you.</p>
<p>5362</p> <p>1 number of average monthly streams per ad-supported</p> <p>2 user based on these results?</p> <p>3 A. Yes.</p> <p>4 Q. And I'd ask you to turn to Exhibit 1068</p> <p>5 of your WRT, paragraph 27. I will give you a moment</p> <p>6 to read this paragraph.</p> <p>7 A. Paragraph --</p> <p>8 Q. It is on page 10, paragraph 27 and</p> <p>9 continues on to page 11 of your written rebuttal</p> <p>10 testimony.</p> <p>11 A. Okay.</p> <p>12 Q. Does this paragraph contain the average</p> <p>13 number of streams per month per paid user?</p> <p>14 A. It does.</p> <p>15 Q. And likewise for ad-supported users?</p> <p>16 A. It does.</p> <p>17 Q. And did you review the numbers in this</p> <p>18 paragraph?</p> <p>19 A. Yes.</p> <p>20 Q. And did you -- in your experience were</p> <p>21 they in line with other numbers you have seen at</p> <p>22 Spotify for average number of streams, zero per</p> <p>23 seconds or greater per user?</p> <p>24 A. Yes.</p> <p>25 Q. Did that give you confidence in the</p>	<p>5364</p> <p>1 THE WITNESS: Yes.</p> <p>2 BY MR. SCHMIDT:</p> <p>3 Q. And is that your understanding of what</p> <p>4 happened here?</p> <p>5 A. Yes.</p> <p>6 Q. And do you rely on them to tell you how</p> <p>7 to interpret the data they pull?</p> <p>8 A. Yes.</p> <p>9 Q. And have you in the past checked their</p> <p>10 work?</p> <p>11 A. To the conclusions, yes.</p> <p>12 Q. And have you generally found them to be</p> <p>13 reliable?</p> <p>14 A. Very.</p> <p>15 MR. SCHMIDT: Thank you very much. No</p> <p>16 further questions.</p> <p>17 MR. WEIGENSBERG: Your Honor, if I may</p> <p>18 very briefly, we're not going to do a recross, but</p> <p>19 we're most likely going to draft up something</p> <p>20 over -- very brief -- over the weekend submitting</p> <p>21 once we're back after the long weekend on this</p> <p>22 issue, on the various objections we have raised.</p> <p>23 JUDGE BARNETT: Okay. Thank you. As</p> <p>24 long as you share it with each other and give us</p> <p>25 both sides of any questions that are raised.</p>

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<p style="text-align: right;">5365</p> <p>1 MR. WEIGENBERG: Of course.</p> <p>2 MR. MANCINI: Yes. And it would be</p> <p>3 useful if we can just meet and confer on the</p> <p>4 schedule for that.</p> <p>5 MR. WEIGENBERG: Of course, Mr. Mancini.</p> <p>6 JUDGE BARNETT: Thank you, Mr. Vogel.</p> <p>7 You may be excused.</p> <p>8 THE WITNESS: Thank you.</p> <p>9 MR. ELKIN: Good afternoon, Your Honor.</p> <p>10 Amazon calls Robert Klein.</p> <p>11 JUDGE BARNETT: Thank you. Before you</p> <p>12 sit down, please raise your right hand.</p> <p>13 Whereupon--</p> <p>14 ROBERT KLEIN,</p> <p>15 having been first duly sworn, was examined and</p> <p>16 testified as follows:</p> <p>17 JUDGE BARNETT: Please be seated.</p> <p>18 MR. ZAKARIN: Your Honor, before Mr.</p> <p>19 Elkin starts with his direct examination of the</p> <p>20 witness, we have a motion in limine directed to this</p> <p>21 witness on a variety -- I hesitate to use the word</p> <p>22 prongs, but I will -- on a variety of prongs that</p> <p>23 relate to his testimony, his report, the propriety</p> <p>24 of it, and whether it is a rebuttal or whether it</p> <p>25 really, among other things, should have been part of</p>	<p style="text-align: right;">5367</p> <p>1 you put together.</p> <p>2 A. Yes.</p> <p>3 Q. And you should have a binder in front of</p> <p>4 you.</p> <p>5 A. Yes, I do.</p> <p>6 Q. Those are proposed exhibits, okay?</p> <p>7 A. Yes.</p> <p>8 Q. Just if you could turn to your --</p> <p>9 MR. ELKIN: Your Honor, this is going to</p> <p>10 be in open session to begin with. We're going to</p> <p>11 try to keep it in open session for as long as I</p> <p>12 possibly can.</p> <p>13 JUDGE BARNETT: Thank you so much.</p> <p>14 MR. ELKIN: Sure.</p> <p>15 BY MR. ELKIN:</p> <p>16 Q. Can you turn to your first slide and take</p> <p>17 the Panel through your professional qualifications</p> <p>18 and educational background?</p> <p>19 A. Sure. I have a Bachelor of Science</p> <p>20 degree from MIT in mechanical engineering and a</p> <p>21 Master of Science degree from the MIT Sloan School</p> <p>22 of Management, that was equivalent to an MBA before</p> <p>23 MIT offered that degree.</p> <p>24 I spent two years in the U.S. Public</p> <p>25 Health Service as a commissioned officer. I was</p>
<p style="text-align: right;">5366</p> <p>1 their direct case. That is before Your Honors. I</p> <p>2 just wanted to raise that.</p> <p>3 So we will be objecting to it on that</p> <p>4 basis, and I know Your Honors will get to that</p> <p>5 motion.</p> <p>6 JUDGE BARNETT: Thank you. We will</p> <p>7 consider it a standing objection then, Mr. Zakarin.</p> <p>8 MR. ZAKARIN: Yes, Your Honor.</p> <p>9 JUDGE BARNETT: And go from there.</p> <p>10 DIRECT EXAMINATION</p> <p>11 BY MR. ELKIN:</p> <p>12 Q. Afternoon, Panel. Afternoon, Mr. Klein.</p> <p>13 A. Good afternoon.</p> <p>14 Q. Could you please state your full name for</p> <p>15 the record.</p> <p>16 A. Yes, Robert L. Klein.</p> <p>17 Q. Just a couple of housekeeping items, if</p> <p>18 you can. Try to pull the mic closer to you, if you</p> <p>19 can, so everyone can hear you.</p> <p>20 A. Okay. Is that better?</p> <p>21 Q. Yes, I think it is, but folks in the back</p> <p>22 of the room will have to be the true test.</p> <p>23 You have a monitor in front of you.</p> <p>24 A. Yes.</p> <p>25 Q. We will be exhibiting some slides that</p>	<p style="text-align: right;">5368</p> <p>1 stationed at NIH in Bethesda, the Division of</p> <p>2 Computer Research and Technology. I went back to</p> <p>3 the Boston area in 1970 and joined up with a couple</p> <p>4 of my former professors and their students starting</p> <p>5 a company called Management Decision Systems.</p> <p>6 And at Management Decision Systems, we</p> <p>7 were doing market research and marketing consulting,</p> <p>8 helping companies like Gillette and Nabisco,</p> <p>9 Coca-Cola, Myles Laboratories and so on, figure out</p> <p>10 how much to spend for advertising, when to schedule</p> <p>11 promotions, and how to predict whether a product was</p> <p>12 going to be successful before they brought it onto</p> <p>13 the market.</p> <p>14 That was how I got into the market</p> <p>15 research field. And I have been doing it now for</p> <p>16 almost 50 years. Management Decision Systems grew</p> <p>17 over a 15-year period to having about 250 employees</p> <p>18 and offices throughout the U.S. and as well as in</p> <p>19 Europe and Asia. And in 1985 we were acquired by</p> <p>20 Information Resources, which was then the fourth</p> <p>21 largest market research company in the world.</p> <p>22 I became executive vice president of</p> <p>23 Information Resources, or IRI as we kind of referred</p> <p>24 to it, and I was responsible for a custom projects</p> <p>25 consulting operation. I worked outside the consumer</p>

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<p>5369</p> <p>1 packaged goods industry and I was working with 2 companies like General Motors to understand how -- 3 what customers really wanted from vehicles and then 4 how engineers could design the vehicles to meet the 5 customer needs. 6 And the -- I left IRI after about three 7 years and started Applied Marketing Science with 8 another MIT professor. And our focus since the 9 beginning of Applied Marketing Science has been to 10 understand what customer wants, needs really are and 11 engineering products, helping companies engineer 12 products that are going to be responsive to those 13 customer wants and needs. 14 Q. And for how many years have you been with 15 Applied Marketing Science? 16 A. It has been 28 years now. 17 Q. And how many employees do you have? 18 A. We have about 35, 30 to 35 employees in 19 our offices in suburban Boston. 20 Q. And, Mr. Klein, have you personally 21 designed and conducted any market research surveys? 22 A. I have conducted, designed, conducted, 23 analyzed over 1,000 market research surveys in my 24 career. 25 Q. Is that for both litigation and</p>	<p>5371</p> <p>1 100 times, both in deposition and in trial testimony 2 in Federal Court in the U.S., as well as in Canada 3 and also before the Trademark Trial and Appeal Board 4 for the Patent and Trademark Office. 5 Q. Approximately how many times have you 6 conducted consumer surveys for use in litigation? 7 A. There have been approximately 150 surveys 8 that I have designed and conducted for litigation 9 purposes. 10 Q. And have you testified in the past four 11 years? 12 A. Yes, I have. I have testified in 30 13 proceedings over the last four years. 14 Q. And with respect to your having been 15 offered as an expert in the past, has any tribunal 16 or Court refused to recognize your expertise? 17 A. No, they haven't. 18 MR. ELKIN: Members of the Panel, we 19 offer Mr. Klein as an expert in the field of 20 consumer survey market research. 21 MR. ZAKARIN: Subject to the same 22 standing objection, but we have no question about 23 his credentials. 24 JUDGE BARNETT: Thank you. Mr. Klein is 25 so qualified.</p>
<p>5370</p> <p>1 non-litigation clients? 2 A. That's right. The majority were for 3 non-litigation clients. 4 Q. Okay. And are you active in any 5 professional associations? 6 A. Yes, I am. 7 Q. Which ones? 8 A. There is the International Trademark 9 Association, where I have been on the -- where I was 10 on the Proof of Confusion Subcommittee for four 11 years and the Opposition and Cancellations Committee 12 for two years. 13 The AAPOR is the American Association of 14 Public Opinion Research. CASRO was the Council of 15 American Survey Research Organizations. INFORMS is 16 an International Society for Operations, Research, 17 and Management Science. That's a more academic 18 organization. 19 Q. Okay. If you turn to slide 2, have you 20 had occasion to provide expert testimony in the 21 field of survey research in the past? 22 A. Yes, I have. 23 Q. Could you take the Panel through your 24 experience? 25 A. Sure. I have testified in approximately</p>	<p>5372</p> <p>1 MR. ELKIN: Thank you, Your Honor. 2 BY MR. ELKIN: 3 Q. Mr. Klein, have you submitted written 4 rebuttal testimony in this matter in the capacity of 5 an expert? 6 A. Yes, I have. 7 Q. Please turn to Amazon Trial Exhibit 249 8 in the binder that you have. 9 A. Yes. 10 Q. Is 249 the written rebuttal testimony 11 that you submitted in this proceeding? 12 A. Yes, it is. 13 Q. I draw your attention to the last page of 14 this exhibit headed Declaration of Robert Klein. Is 15 that your signature at the end of the page? 16 A. Yes, it is. 17 MR. ELKIN: Your Honor, I would ask to be 18 admitted into evidence Amazon Trial Exhibit 249. 19 MR. ZAKARIN: Again, subject to the same 20 objection. 21 JUDGE BARNETT: Admitted, subject to the 22 objection. 23 (Amazon Exhibit Number 249 was marked and 24 received into evidence.) 25 BY MR. ELKIN:</p>

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<p>5373</p> <p>1 Q. Could you please tell the Panel what you 2 were asked to do as an expert in this case? 3 A. I was asked to design and conduct and 4 analyze a market research survey that would be 5 relied upon by Dr. Hubbard in responding to certain 6 assertions made by the Copyright Owners in this 7 proceeding. 8 Q. Okay. And take a look at paragraph 10 of 9 your written rebuttal testimony. It starts on page 10 2, the bottom of page 2 and carries over to page 3. 11 Tell me when you are there. 12 A. Okay. I'm here. 13 Q. And go to page 10, the first full 14 sentence that begins at the end of line 1. 15 A. In paragraph 10? 16 Q. Yeah. It is actually on page -- yeah, 17 page 3, top of the page. Do you see where it says, 18 "It is my understanding that this information will 19 be relied upon by other experts in responding to and 20 rebutting certain rate proposals and related 21 assertions made by other participants in this 22 proceeding," and it goes on from there. Do you see 23 that? 24 A. Yes, I do. 25 Q. When you made reference to "relied upon</p>	<p>5375</p> <p>1 contained in his witness statement. And he was 2 questioned about it at his deposition. And what 3 they are doing is they are now trying to fill in 4 holes with his testimony that doesn't exist in his 5 written rebuttal testimony. 6 MR. ELKIN: May I be heard, Your Honor? 7 MR. ZAKARIN: None of that is there. 8 JUDGE BARNETT: Yes. 9 MR. ELKIN: Thank you. Number 1, there 10 is a reference with regard to assertions in two 11 places in paragraph 10. And as was discussed when 12 the Copyright Owners' case, I believe, was nearing 13 the end, I think the Panel went into recess and 14 determined whether or not something, because 15 something is not fully elaborated in a written 16 testimony that it was appropriate, as long as there 17 was a reference to it for the witness to actually be 18 able to provide amplification. 19 And I do take issue with regard to the 20 representation that has been made to the Court, to 21 the Board with regard to exactly what Mr. Klein was 22 asked in his deposition. It had to do with the rate 23 proposals and whether he had specifically reviewed 24 witness statements. 25 He can take Mr. Klein through that on</p>
<p>5374</p> <p>1 by other experts," what experts were you referring 2 to? 3 A. Dr. Hubbard. 4 Q. Okay. And go to the first -- go back to 5 page 2. This is the -- I am going to ask you, 6 again, paragraph 10, the first sentence, which 7 reads, "I was asked by counsel for Amazon to design, 8 execute, and analyze a market research survey, (the 9 Klein survey), to respond to certain royalty rate 10 proposals and related assertions made by other 11 participants in the Phono III royalty rate-setting 12 proceeding." 13 Do you see that? 14 A. Yes, I do. 15 Q. What were you -- the reference to 16 "related assertions made by other participants," can 17 you tell the Panel what assertions you were 18 referring to? 19 A. Yes. There were several. First, that 20 the service providers could raise their prices and, 21 second, that consumers would pay more for music 22 streaming services, and, third, that the royalty 23 owners would make more money under those -- under 24 that proposal. 25 MR. ZAKARIN: Objection. None of this is</p>	<p>5376</p> <p>1 cross-examination, but I appreciate the Panel's 2 indulgence to hear me out on that. 3 JUDGE BARNETT: Where in the written 4 report are the assumptions that Mr. Klein relied 5 upon? 6 MR. ELKIN: It is set forth in, I think, 7 paragraph 10, pages 2 and 3. 8 MR. ZAKARIN: If I might, Your Honor. 9 MR. ELKIN: And there are other 10 appendices as well. And, Your Honor, this is not a 11 material part. He answered the question. It is not 12 a material part of the examination. I don't want to 13 belabor the time of the proceedings to go forward. 14 He answered the question and I am going to move on. 15 JUDGE BARNETT: Okay. 16 MR. ZAKARIN: And I move to strike. 17 JUDGE BARNETT: Sustained. 18 MR. ZAKARIN: Thank you, Your Honor. 19 BY MR. ELKIN: 20 Q. With regard to the background and 21 information related to any assertions you heard by 22 the Copyright Owners, how did you come to have an 23 understanding as to that? 24 A. From discussions with counsel. 25 Q. Okay. And you didn't read any written</p>

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<p>5377</p> <p>1 direct testimony, right?</p> <p>2 A. No, I did not.</p> <p>3 Q. You didn't read any rate proposals,</p> <p>4 right?</p> <p>5 A. No, I did not.</p> <p>6 Q. Thank you. And what was the purpose for</p> <p>7 speaking to counsel related to the Copyright Owners'</p> <p>8 assertions?</p> <p>9 A. Well, to understand what the type of</p> <p>10 information that would be useful for Dr. Hubbard's</p> <p>11 rebuttal testimony.</p> <p>12 Q. And did you perform the analysis we</p> <p>13 discussed and come to any conclusions to the Panel?</p> <p>14 A. Yes, I did.</p> <p>15 Q. Did you reach any certain opinions to a</p> <p>16 reasonable degree of professional certainty</p> <p>17 regarding the behavior of users of musical streaming</p> <p>18 services?</p> <p>19 A. Yes, I did.</p> <p>20 Q. And how did you reach your opinions?</p> <p>21 A. Well, I conducted, designed and conducted</p> <p>22 market research among current users of music</p> <p>23 streaming services to understand their past</p> <p>24 behavior, their current practices, and how they</p> <p>25 would respond to alternative changes, increases,</p>	<p>5379</p> <p>1 is what we call double-blind, that the respondent to</p> <p>2 the survey doesn't know how the results are going to</p> <p>3 be used so they can't really kind of game the</p> <p>4 survey. It is similar to the way in a drug trial,</p> <p>5 neither the doctor nor the patient are supposed to</p> <p>6 know what is the placebo and which is the real</p> <p>7 product.</p> <p>8 JUDGE STRICKLER: So in this case -- good</p> <p>9 afternoon, by the way.</p> <p>10 THE WITNESS: Good afternoon.</p> <p>11 JUDGE STRICKLER: -- it was</p> <p>12 double-blind. So the respondents didn't know the</p> <p>13 purpose of the study. And what is the other</p> <p>14 blindness that related to the double aspect?</p> <p>15 THE WITNESS: And so when it is an</p> <p>16 interview administered survey, we want to make sure</p> <p>17 the interviewer, person who is collecting the data</p> <p>18 asking the questions over the phone or in person</p> <p>19 doesn't know what the right answer is or what answer</p> <p>20 is desired or what we're looking for.</p> <p>21 In this case, as you will see in a</p> <p>22 moment, since the survey was conducted over the</p> <p>23 Internet, the computer doesn't know and so the other</p> <p>24 half of the double-blind is easy because the</p> <p>25 computer doesn't care how you are going to use the</p>
<p>5378</p> <p>1 actually, in the price of the Amazon service.</p> <p>2 Q. And normally I would ask you at this</p> <p>3 point to give the Panel a brief overview of those</p> <p>4 conclusions, but that would take us to a restricted</p> <p>5 session, so I am going to come back to that.</p> <p>6 Instead, I am going to ask you to turn to</p> <p>7 the next slide, and tell the Panel how one normally</p> <p>8 goes about designing a consumer survey?</p> <p>9 A. Well, there are a number of steps</p> <p>10 involved. The first, and this list comes from the</p> <p>11 Manual For Complex Litigation, but it is actually a</p> <p>12 useful set of guidelines for doing any sort of</p> <p>13 market research.</p> <p>14 It is, first of all, figure out who you</p> <p>15 need to talk to to define the population</p> <p>16 appropriately and make sure that you have got a</p> <p>17 representative sample of that population.</p> <p>18 We also want to make sure that we have</p> <p>19 collected the data and accurately reported it and</p> <p>20 analyzed it appropriately. We want to make sure the</p> <p>21 questions that we ask are clear and not leading and</p> <p>22 that we conduct the survey, if it is an in-person</p> <p>23 interview that the qualified people are conducting</p> <p>24 the actual survey.</p> <p>25 We also want to make sure that the survey</p>	<p>5380</p> <p>1 data.</p> <p>2 JUDGE STRICKLER: Did you pretest this</p> <p>3 survey and then -- in order to see if there were any</p> <p>4 problems or ambiguities in the questions or any</p> <p>5 other potential defects in the survey?</p> <p>6 THE WITNESS: Yes, we did. We always do</p> <p>7 that.</p> <p>8 JUDGE STRICKLER: Is that mentioned in</p> <p>9 the report?</p> <p>10 THE WITNESS: I am not sure whether it is</p> <p>11 mentioned in the report. It is certainly standard</p> <p>12 practice for market research.</p> <p>13 JUDGE STRICKLER: Thank you.</p> <p>14 BY MR. ELKIN:</p> <p>15 Q. And with respect to the guidelines that</p> <p>16 you normally follow, did you follow them in this</p> <p>17 particular survey?</p> <p>18 A. Yes, we did.</p> <p>19 Q. So why don't you turn to your next slide</p> <p>20 and take the Panel through how you designed this</p> <p>21 particular survey.</p> <p>22 A. So we wanted to do and use the Internet</p> <p>23 to collect the data, kind of would be appropriate,</p> <p>24 given that this is a service that is -- that is</p> <p>25 delivered over the Internet. And the way these</p>

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<p style="text-align: right;">5381</p> <p>1 Internet surveys work is you contract with one or 2 more of these companies that have built panels of 3 people who have agreed to participate in market 4 research surveys. 5 And so there are over 100 companies now 6 that have built panels of various sizes and with 7 certain -- some are general population, some are 8 much more narrowly defined, like orthopaedic 9 surgeons. We were working here with Research Now. 10 It is a well-established panel data company with 2.2 11 million members, active members in the U.S. 12 And so working from the Research Now 13 panel, we define the universe of people that we 14 wanted to talk to. And so the respondents or 15 appropriate respondents to the survey were men and 16 women aged 18 and over. And the reason for the 18 17 and over is that as -- when you are working with 18 younger respondents, you then have to worry about 19 things like parental permission and stuff like that. 20 So minimum 18 and over, living in the 21 U.S., were currently listening to music on the 22 Internet, I am going to refer to them later as 23 streamers, and those who played a major role in the 24 decision of what current music streaming service 25 they are going to use. So we want to talk to</p>	<p style="text-align: right;">5383</p> <p>1 decision-makers. We also excluded Amazon employees 2 because what we were offering was an Amazon product, 3 and they were going to have naturally a different 4 kind of response than non-Amazon employees. 5 And we also include people who work in 6 the market research industry. We know we're 7 different. And so it is traditional to exclude 8 other market researchers from participating in the 9 surveys. 10 JUDGE BARNETT: So you "excluded" market 11 researchers? 12 THE WITNESS: Excluded, yes. 13 JUDGE BARNETT: Thank you. 14 BY MR. ELKIN: 15 Q. Turning to your next slide, could you 16 take the Panel through what you finally ended up 17 with in terms of a data set of respondents? 18 A. Okay. So almost 5,000 respondents or 19 individuals responded to the invitation they were 20 sent from Research Now. So Research Now sends an 21 e-mail invitation to the -- to their panel members 22 in proportion to the type of responses they expect 23 to get. And we wanted a balanced sample. And so 24 women respond quicker, more frequently than men. 25 And so you send out more to men. You send out more</p>
<p style="text-align: right;">5382</p> <p>1 decisionmakers who are listening to music over the 2 Internet. 3 JUDGE STRICKLER: Sir, when you were 4 trying to determine whether the potential survey 5 respondents were music streamers, did you 6 distinguish between interactive and non-interactive? 7 THE WITNESS: We did at a later point in 8 the survey, as you will see the first screening 9 question, once we established the screeners and we 10 go through what services they used and whether it 11 was ad-supported or not and so on. So as you will 12 see later, I will be defining that. 13 JUDGE STRICKLER: Thank you. 14 BY MR. ELKIN: 15 Q. Did you ask the participants screening 16 questions in order to qualify them for the survey? 17 A. Yes, we did. 18 Q. And what did you do in that regard? 19 A. So -- 20 Q. I think you started that a little bit. 21 A. I'm sorry? 22 Q. I think you had started your answer, I 23 think, with regard to the screening. 24 A. Yes. And so we excluded respondents who 25 weren't the 18 and over and men and women</p>	<p style="text-align: right;">5384</p> <p>1 to younger men in order that the group that comes to 2 your survey is appropriately balanced. 3 So we had -- they get an e-mail with a 4 clickable link on it. They click on the link and 5 that takes them to the actual survey, which is on 6 our computers. A total of 2141 respondents 7 qualified for and completed the survey, so they 8 passed the various screening tests. 9 We did some standard data cleaning 10 operation for people who type kind of nonsense to 11 some of the open-ended questions and that excluded 12 40 respondents. So we wound up with a final data 13 set of just over 2100 respondents. 14 Q. Turning to your next slide, after you 15 were able to arrive at the data set, did you ask 16 respondents any preliminary questions? 17 A. Yes. What we do next is we wanted to 18 classify people into various tracks and buckets. 19 The first thing we wanted to know is do they 20 currently own an Alexa-enabled device? So that's 21 one of the options you can see on QS-6. 22 And the QS stands for the question 23 screening question number 6. 24 So they can check all that apply. If 25 they check the Amazon Alexa-enabled device, we know</p>

<p>5385</p> <p>1 that that's going to put them into one set of 2 categories. They will get one slightly different 3 wording for some of the later questions because they 4 own an Alexa-enabled device.</p> <p>5 We next ask them which of the following 6 services they subscribe to? And as you can see, 7 Amazon Prime is one of the services because that, 8 again, classified them and would take them down a 9 particular track, track of the survey.</p> <p>10 Q. Okay. And turning to the next slide, did 11 you ask any other preliminary questions?</p> <p>12 A. So here is the question that identifies 13 music streamers. You can see it is fourth from the 14 bottom that they streamed or listened to music over 15 the Internet. So if they checked that as something 16 that they have done, then they are going to continue 17 on with the survey.</p> <p>18 If they haven't streamed or listened to 19 music over the Internet, then they get a thank you 20 for your help, you don't really qualify for the 21 survey, and things move on from there.</p> <p>22 Q. Okay. Turning to the next slide, what 23 other preliminary questions did you ask before you 24 got to the main survey?</p> <p>25 A. So now we have identified music</p>	<p>5387</p> <p>1 they using a paid version? Are they using the 2 ad-supported free version or are they currently in a 3 free trial before their paid subscription starts or 4 are they not sure or don't know.</p> <p>5 And so this now tells us are they using, 6 again, the paid service or an unpaid service.</p> <p>7 Q. But those who didn't know, were they 8 permitted to continue?</p> <p>9 A. No, they weren't.</p> <p>10 Q. Okay. So let's now turn if we could to 11 the main survey instrument itself, the next slide. 12 Once you had qualified the respondents for the 13 survey and had completed these preliminary questions 14 that you just took the Panel through, how many -- 15 how did the survey proceed from there?</p> <p>16 A. So from here we want to know, okay, we 17 know what you currently do, what were you doing 18 immediately before this? And so here is the 19 question that is asked for current subscribers of 20 Amazon Music Unlimited.</p> <p>21 Again, which of the following best 22 describes your music streaming habits before you 23 subscribed to Amazon Music Unlimited? And they 24 could use Amazon Prime. They could have used 25 another one or more ad-supported free music</p>
<p>5386</p> <p>1 streamers. And the next question is what services 2 have they ever used? And they can check all that 3 apply, and also include any that we didn't list 4 there.</p> <p>5 And then for those that they check off 6 that they have ever used, they are asked: Which of 7 the following do you currently use? And so this 8 gives us now our classification of people as to 9 whether they are current users of a service and 10 whether they have ever used it in the past.</p> <p>11 And you will see how that folds into the 12 analysis in a few minutes.</p> <p>13 Q. And turning to the next slide, any other 14 final screening?</p> <p>15 A. And so the last piece is to determine for 16 each of these services what flavor of it are they 17 using. For Amazon, are they using Amazon Music 18 Unlimited, which is the full catalogue? Are they 19 using Amazon Prime Music, which is the more limited 20 catalogue? Or, you know, are they not sure which 21 one they are using?</p> <p>22 And then, second, for each of the 23 services that they are currently using, we ask are 24 they using the paid version? This would be if they 25 checked off user as a service that they used. Are</p>	<p>5388</p> <p>1 streaming services. They could have used a paid 2 service, paid subscription to a different service 3 or they may not have been streaming at all.</p> <p>4 Q. So that was with regard to Amazon users. 5 What about with respect to non-Amazon users?</p> <p>6 Turning to the next slide, did you ask a similar 7 question for non-Amazon Music Unlimited subscribers?</p> <p>8 A. Yes, we did. And this slide shows the 9 questions that we asked of current Apple Music 10 users, what they did and we want to know what did 11 you do before you came to Apple. So what was the 12 path that brought you to Apple?</p> <p>13 JUDGE STRICKLER: I have a question for 14 you. On these two questions, which are the same as 15 I understand it, except for the name of the service, 16 why didn't you ask the question -- and you may have 17 a good reason, I am not suggesting you should 18 have -- but why didn't you ask the question which of 19 the following best describes your music listening 20 habits before you subscribe to Apple or Amazon?</p> <p>21 THE WITNESS: Well, that's a good 22 question. I think that music listening habits would 23 have required a much more extensive list of options. 24 You know, including, you know, I listen to the radio 25 or SiriusXM or, you know, any number of</p>

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<p>5389</p> <p>1 alternatives.</p> <p>2 And what we really wanted to see in this</p> <p>3 was what music streaming services they used. And</p> <p>4 this will fold in, as you will see later, into the</p> <p>5 issue of how the free or ad-supported services tend</p> <p>6 to lead to paid subscriptions.</p> <p>7 JUDGE STRICKLER: So the limitation was</p> <p>8 because of the attempt to try to measure that</p> <p>9 funneling effect from free to subscription?</p> <p>10 THE WITNESS: That was -- that was one.</p> <p>11 I think -- I don't think we -- I think we were</p> <p>12 concerned about generating a complete list that</p> <p>13 described music listening habits and sort of</p> <p>14 detracting from the issue of the -- of how the</p> <p>15 streaming habits worked into here.</p> <p>16 JUDGE STRICKLER: Thank you.</p> <p>17 BY MR. ELKIN:</p> <p>18 Q. Turning to the next slide, what was the</p> <p>19 next step?</p> <p>20 A. So this was the question that was asked</p> <p>21 next of Amazon Music Unlimited customers is to find</p> <p>22 out, okay, so which version of Amazon Music</p> <p>23 Unlimited are they using? Are they using the \$3.99</p> <p>24 a month to stream to a single device, \$7.99 a month</p> <p>25 to stream to multiple devices?</p>	<p>5391</p> <p>1 members shows \$3.99 for a single Alexa-enabled</p> <p>2 device, \$7.99 for streaming to multiple devices,</p> <p>3 \$9.99 for streaming to other devices. And that's</p> <p>4 the current structure of the market for Prime</p> <p>5 members.</p> <p>6 Similarly, in track 2, cell Number 4 has</p> <p>7 the \$3.99, \$9.99, \$9.99 price, which is what</p> <p>8 non-Prime members see. And so the only difference</p> <p>9 really between the cells 1, 2, and 3 and cells 4, 5,</p> <p>10 and 6 are the lack of the 2-dollar discount for</p> <p>11 non-Prime members.</p> <p>12 JUDGE STRICKLER: When it says multiple</p> <p>13 devices in both of the blocks there, does it also</p> <p>14 refer to Alexa devices?</p> <p>15 THE WITNESS: It would be actually any</p> <p>16 device.</p> <p>17 JUDGE STRICKLER: Any device?</p> <p>18 THE WITNESS: Any Amazon device.</p> <p>19 JUDGE STRICKLER: Amazon device.</p> <p>20 THE WITNESS: Well, or a Smartphone or,</p> <p>21 you know, computer, tablet. The ability to stream</p> <p>22 to a single enabled-Alexa device is a restriction</p> <p>23 that I understand Amazon has placed in order to have</p> <p>24 the lower price, so you are streaming to just the</p> <p>25 single device and not to your Smartphone or so on.</p>
<p>5390</p> <p>1 Maybe they are currently in a, again, in</p> <p>2 the free trial period before their paid subscription</p> <p>3 or they don't know or are unsure.</p> <p>4 And for Amazon Music Unlimited customers,</p> <p>5 this was the last question they were asked. And so</p> <p>6 we switched over then to focus the rest of the</p> <p>7 survey on non-current users of Amazon Music</p> <p>8 Unlimited.</p> <p>9 Q. So for the subscribers to Amazon Music</p> <p>10 Unlimited at this point they had completed the</p> <p>11 survey, correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Okay. Turn to the next slide. How many</p> <p>14 of the -- how did the survey proceed relative to the</p> <p>15 remaining respondents?</p> <p>16 A. Okay. So now we have identified</p> <p>17 previously Prime members and non-Prime, Amazon Prime</p> <p>18 members. And so we divided them into two tracks.</p> <p>19 And within each one of the tracks we randomly</p> <p>20 assigned individuals to one of three cells.</p> <p>21 And the cells differed in terms of the</p> <p>22 prices that they were shown for streaming to a</p> <p>23 single Alexa-enabled device, streaming to multiple</p> <p>24 devices, or stream using other services.</p> <p>25 And so as you can see, cell 1 for Prime</p>	<p>5392</p> <p>1 JUDGE STRICKLER: Thank you.</p> <p>2 BY MR. ELKIN:</p> <p>3 Q. Turning to the next slide, now that you</p> <p>4 have had respondents in the two tracks that you just</p> <p>5 took the Panel through, if you could walk the Panel</p> <p>6 through what happened next?</p> <p>7 A. Okay. So now we want to tell people</p> <p>8 about Amazon Music Unlimited and what its pricing</p> <p>9 is. And so this is just an example of what Prime</p> <p>10 members saw who are in cell number 3.</p> <p>11 And so the first paragraph talks about</p> <p>12 Amazon offering two different music streaming</p> <p>13 services, Amazon Prime Music with a more limited</p> <p>14 catalogue, Amazon Music Unlimited with a full</p> <p>15 catalogue.</p> <p>16 The second paragraph lays out the pricing</p> <p>17 for each of these services. And so it talks about</p> <p>18 \$5.99 a month for a single Alexa-enabled device,</p> <p>19 because, remember, this is cell 3, \$9.99 a month for</p> <p>20 multiple devices, and that this is -- it points out</p> <p>21 this is a 2 dollar a month discount over the regular</p> <p>22 monthly price of \$11.99. And to complete the</p> <p>23 picture, we asked them to assume that other paid</p> <p>24 music streaming services would also be priced at</p> <p>25 \$11.99 a month, the same as the Amazon pricing.</p>

<p>5393</p> <p>1 Q. Turning to the next slide, what happened 2 next for those track 1 Prime member respondents? 3 A. So for these -- having explained the 4 various Amazon services, they are given the option, 5 they are asked to select what they would do. And so 6 we have got four options for their paid streaming 7 services. And, again, remember, this is cell 3. 8 So they could pay \$9.99 per month to 9 stream Amazon Music Unlimited. If they didn't own 10 an Amazon -- an Alexa-enabled device, then the 11 wording here is what they would see, they would 12 purchase an Alexa-enabled device and pay \$5.99 a 13 month. 14 If they actually already owned an 15 Alexa-enabled device, the wording would be slightly 16 different to reflect that or they could continue 17 paying for the current monthly subscription, which 18 would be priced at \$11.99 a month, assuming, again, 19 that they were currently paying or they could not 20 pay for a monthly streaming subscription. Those 21 were the choices that they were given. 22 They were also given other options for, 23 again, listening to music. And they could listen to 24 an ad-supported free service, music on the radio, 25 download music on the Internet and so on, purchase</p>	<p>5395</p> <p>1 of ways here, including both license and unlicensed 2 services or sources. 3 MR. ELKIN: Judge Barnett, at this point 4 I would ask the Board if we could move into a 5 restricted session. 6 JUDGE BARNETT: We certainly can. Anyone 7 in the hearing room who is not privy to restricted 8 or confidential information, please wait outside. 9 (Whereupon, the trial proceeded in 10 confidential session.) 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p>5394</p> <p>1 CDs, single tracks, all the different ways they 2 could continue to listen to music, in addition to or 3 instead of buying a paid service. 4 Q. So we understand what, now what the track 5 1 Prime member respondents were shown. What were 6 the track 2 non-Prime member respondents shown? 7 A. So the track 2 non-Prime members would 8 see exactly the same set of options, except that 9 they wouldn't see the 2-dollar discount that was 10 offered to the Prime members. 11 So they would see prices, if they were in 12 cell 6, for example, which would be equivalent here, 13 they would see prices of \$5.99, \$11.99, and \$11.99 14 for all of the services. 15 Q. Turning to the next slide, did you ask 16 any additional questions of those respondents who 17 indicated they would choose to download music over 18 the Internet? 19 A. Yes, we did. And for those respondents 20 who said they would not subscribe to a paid music 21 service and would download music over the Internet, 22 we asked, you know, okay, so which of any of the 23 following ways would you choose to download music 24 over the Internet? 25 As you can see, we have listed a number</p>	<p>5409</p> <p>1 O P E N S E S S I O N 2 C R O S S - E X A M I N A T I O N 3 BY MR. ZAKARIN: 4 Q. I think most of the exhibits that we have 5 in our binder are duplicate of what Mr. Elkin just 6 admitted, so I think most of that we will be able to 7 remove, other than this which is his deposition 8 transcript, I suspect. But the rest just on the off 9 chance that Mr. Elkin suddenly went crazy and didn't 10 put in his exhibits, we were prepared to do it. 11 Mr. Klein, good afternoon. 12 A. Good afternoon. 13 Q. Good to see you again. 14 A. Yes. 15 Q. You didn't say it was "good to see" me. 16 (Laughter) 17 JUDGE STRICKLER: He was sworn to tell 18 the truth. 19 MR. ZAKARIN: Not even a little white 20 lie? 21 BY MR. ZAKARIN: 22 Q. Mr. Klein, you were first contacted by 23 Analysis Group in early December about doing a 24 survey for Amazon; is that right? 25 A. That's correct.</p>

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<p style="text-align: right;">5410</p> <p>1 Q. And then you were contacted by Amazon's 2 counsel, Winston & Strawn? 3 A. Yes. 4 Q. Okay. And they told you that they wanted 5 to get some empirical data about streaming music 6 users' habits and price sensitivity that could 7 possibly be relied upon by another expert for 8 Amazon, correct? 9 A. Correct. 10 Q. And did they tell you that it was 11 Dr. Hubbard at that time? 12 A. I believe they did. I am not certain. 13 Q. And you were also told that they, being 14 counsel for Amazon, wanted you to look at the extent 15 to which streaming music users paid for streaming 16 and the extent to which they would be willing to pay 17 in the future, and the role of ad-supported services 18 as an on-ramp for paid services. Is that correct? 19 A. I believe so, yes. 20 Q. But you were not provided with any formal 21 materials at all by them, were you? 22 A. In terms of written testimony or some -- 23 Q. In terms of written materials of any 24 sort. 25 A. Only as I mentioned in my deposition, a</p>	<p style="text-align: right;">5412</p> <p>1 the other Services in like amount, leaving only 2 Amazon with its Prime discounts, correct? 3 A. Yeah, I'm not sure I would phrase it 4 exactly that way, but that if Amazon were forced to 5 raise its prices due to the proposal of the 6 Copyright Owners, that that same pressure would 7 exist on other Services and they would be forced to 8 raise their prices similarly. 9 Q. We will get to the Copyright Owners' 10 proposal and its theoretical impact on Amazon's 11 prices in a minute. You performed a pilot -- Judge 12 Strickler asked you about this. You performed a 13 pilot survey or pretest, correct? 14 A. We both pretested and had a pilot, yes. 15 Q. Right. And there were earlier drafts of 16 the survey that you tested on human beings, correct? 17 A. Yes. 18 Q. And you knew that there was a litigation 19 going on here, didn't you? 20 A. Yes, I did. 21 Q. In fact, you have testified in prior 22 litigations as you have just told the Panel before, 23 haven't you? 24 A. Yes, I have. 25 Q. But knowing that there was a litigation</p>
<p style="text-align: right;">5411</p> <p>1 memo from Analysis Group that laid out certain ideas 2 that they had but which I did not accept. 3 Q. Okay. And that memo, in any event, has 4 that been produced to us? 5 A. I don't know. 6 Q. But you did have a number of discussions 7 with Amazon's attorneys preceding the preparation of 8 your survey questions, right? 9 A. Yes. 10 Q. And they provided you, Amazon's counsel, 11 with monthly prices for different Amazon services 12 and how those prices differed, depending on whether 13 a person was a Prime subscriber or not; isn't that 14 right? 15 A. Yes. 16 Q. And you were not provided with any other 17 pricing information, were you? 18 A. Pricing information related to -- 19 Q. Any streaming service in the marketplace. 20 A. I was, I was told that other streaming 21 services in the marketplace had a similar price to 22 the not discounted Amazon Music Unlimited price. 23 Q. And, in fact, you were told as part of 24 your survey to assume that price increases by any of 25 the Services would be followed by price increases by</p>	<p style="text-align: right;">5413</p> <p>1 going on, you discarded both the questions that you 2 had prepared in your pretest and the results of the 3 pretest, didn't you? 4 A. Well, we don't typically retain or rely 5 on the results of the -- of a pretest in the survey. 6 Q. You may not rely on it, but in a 7 litigation, don't you understand that you are 8 supposed to retain it for purposes of making it 9 available in discovery? 10 A. That's not necessarily -- that's not my 11 understanding. 12 Q. You shared the pretest or pilot survey 13 results with Amazon's counsel, didn't you? 14 A. Yes. 15 Q. And orally, not in writing, they 16 suggested changes to the survey based on the pretest 17 results, didn't they? 18 A. I think we had discussions and those 19 discussions resulted in changes. Whether their 20 specific suggestions, you know, made it into the 21 final survey or not is not something that I'm -- I 22 have much recollection about. 23 Q. Well, you do remember some things about 24 the pretest and preliminary survey, don't you? 25 A. Yes.</p>

<p>5414</p> <p>1 Q. And one of the things that you remember 2 is that in contrast to the survey that you did and 3 that forms the basis of your report, which has jumps 4 in price of 1 dollar and 2 dollar only, your 5 original survey questions had jumps in price of 50 6 cents; isn't that right?</p> <p>7 A. Well, there were, I think, six levels of 8 prices within each of those two tracks going from, 9 if you want to take the current pricing, you know, 10 \$9.99, \$10.49, \$10.99 and so on.</p> <p>11 So we kept the same range of prices in 12 the survey, but we reduced the number of different 13 cells in order to have a larger sample size in each 14 cell and so we could have more confidence in the 15 results.</p> <p>16 Q. I don't think you answered my question. 17 Let me come back to it.</p> <p>18 Your original survey had 50 cents, 1 19 dollar, \$1.50 and 2 dollar increments, did it not?</p> <p>20 A. Yes, it did.</p> <p>21 Q. And what you did was you got rid of the 22 50 cents and you got rid of the \$1.50 so that you 23 only had increments of a dollar in your survey, 24 correct?</p> <p>25 A. That's correct.</p>	<p>5416</p> <p>1 rate-setting proceeding."</p> <p>2 Let's stop there. That's what you were 3 asked to do, correct?</p> <p>4 A. Correct.</p> <p>5 Q. Now, looking at your Appendix B, if you 6 will, which is part, I think, Appendix B is an 7 exhibit -- and I apologize, I don't have that in 8 front of me right now. Your Appendix B, let me just 9 get that. It will be easier in life to refer to 10 Appendix B as an exhibit. I think we will all be 11 better off.</p> <p>12 It may just simply be -- and I 13 apologize -- it may just simply be part of your 14 witness statement. Give me a second.</p> <p>15 Appendix B is not offered. I think it is 16 -- I think it may be in our book. Appendix B is the 17 list of the exhibits to which you referred. Do you 18 have Appendix B anywhere in front of you, in your 19 witness statement?</p> <p>20 A. No, I don't. But the witness statement 21 identifies Appendix B has documents reviewed.</p> <p>22 Q. Yes.</p> <p>23 A. Which is the --</p> <p>24 Q. And the documents reviewed, I think, are 25 all of exhibits, I think they are 251 through 262.</p>
<p>5415</p> <p>1 Q. But you don't recall as you sit here now 2 what the results of your pretest was with respect to 3 those 50 cent increments, do you?</p> <p>4 A. Well, we didn't have, you know, 5 sufficient sample size to draw any conclusions about 6 those 50 cent jumps.</p> <p>7 Q. Now, in terms of your survey, you didn't 8 have any discussions with any of Amazon's fact 9 witnesses; isn't that right?</p> <p>10 A. I believe that's correct.</p> <p>11 Q. Okay. And you didn't talk to any of 12 Amazon's expert witnesses, did you?</p> <p>13 A. No, we didn't.</p> <p>14 Q. Now, Mr. Elkin asked you about paragraph 15 10 of your witness statement, and I would like to 16 turn to that for a second, which I think appears on 17 page 2.</p> <p>18 A. Yes.</p> <p>19 Q. And you say here, and I am reading, I 20 want to make sure I read it correctly, that "I was 21 asked by counsel for Amazon to design, execute, and 22 analyze a market research survey, (the Klein 23 survey), to respond to certain royalty rate 24 proposals and related assertions made by other 25 participants in the Phonorecords III royalty</p>	<p>5417</p> <p>1 A. I believe that's correct, yes.</p> <p>2 Q. Could you take a look at that? Maybe 3 that's the easier way of doing it.</p> <p>4 So Exhibits 251 through 262, none of 5 those exhibits are a rate proposal made in this 6 proceeding, are they?</p> <p>7 A. That's correct.</p> <p>8 Q. And, in fact, for purposes of your 9 survey, you never saw a single rate proposal, did 10 you?</p> <p>11 A. That's correct.</p> <p>12 Q. And you didn't examine the existing rate 13 structure under the Section 115 of the Copyright Act 14 either, did you?</p> <p>15 A. No, I didn't. I'm not sure I would know 16 how to interpret anything in there.</p> <p>17 Q. And you didn't read -- strike that. 18 You didn't read or even receive a single 19 witness statement to which your survey was supposed 20 to rebut?</p> <p>21 A. That's correct.</p> <p>22 Q. And I want to turn to what I think is 23 page 17 of your slides. Do you have that in front 24 of you? You should have the slides there. If not, 25 I think I have an extra copy. It was in the pocket</p>

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<p>5418</p> <p>1 of Amazon's -- there you are, we just went through 2 that with Mr. Elkin. It is the summary of 3 conclusions page. 4 A. Okay. 5 Q. Do you see that? 6 A. Yes. 7 Q. Now, were you ever told, by the way, what 8 assertions your survey was intended to rebut? 9 A. Yes. I mean, the assertions had to do 10 with the effect on price of the -- of the service 11 and how consumers would respond to it. 12 Q. Were you told that you were responding to 13 the Copyright Owners' rate proposal or assertions 14 made by the Copyright Owners? 15 A. I'm not sure I understand the difference. 16 Q. I will withdraw the question. Look at 17 your summary of conclusions. Do you see them on 18 page 17? 19 A. Yes. 20 Q. Okay. Do you know if in the Copyright 21 Owners' direct case they took issue with any of the 22 issues that are addressed in this page necessitating 23 a rebuttal statement? 24 A. I don't know the specifics of the 25 assertions that are -- were made, other than that we</p>	<p>5420</p> <p>1 counsel that the 1- and 2-dollar price increases 2 that were used in my survey were an appropriate -- 3 were appropriate, given the Copyright Owners' rate 4 proposals. 5 Q. They told you that the 1-dollar or 6 2-dollar increase was what would be occasioned by 7 the Copyright Owners' proposal, is that what they 8 told you? 9 A. That the 1- or 2-dollar increase was 10 appropriate boundaries on -- to reflect the 11 Copyright Owners' proposal. 12 Q. Did they give you any data at all that 13 linked that 1-dollar or 2-dollar increase to 14 anything in the Copyright Owners' proposal? 15 A. Data, no. 16 Q. Okay. So they gave you no information at 17 all that would show you what the supposed price 18 impact would be if the Copyright Owners' proposal 19 were adopted? 20 MR. ELKIN: Objection, misstates the 21 witness' testimony just now. 22 JUDGE BARNETT: Sustained. 23 BY MR. ZAKARIN: 24 Q. Mr. Klein, if you were doing a price 25 sensitivity survey for a company looking to figure</p>
<p>5419</p> <p>1 have, you know, as you can see in the last point, 2 that increase in prices move customers toward the 3 free ad-supported services. 4 And it is my understanding that the 5 Copyright Owners were asserting that consumers would 6 be willing to pay more for music streaming services, 7 and so this really addresses that specific point. 8 Q. Where did you get that understanding that 9 the Copyright Owners were asserting that consumers 10 would be willing to pay more? 11 A. The discussions with counsel indicated 12 that price sensitivity was an important issue in the 13 case, and that Dr. Hubbard wanted to get some 14 empirical data to support his opinion regarding what 15 consumers of streaming music services would do in 16 the event of price increases. 17 Q. It is true, isn't it, Mr. Klein, that 18 none of your survey questions test the reaction of 19 any of the respondents to any price increases that 20 would supposedly result from the Copyright Owners' 21 rate proposal, even assuming that any price increase 22 were passed through in whole or in part to the 23 consumer? 24 A. Well, that's not my understanding. I 25 mean, my understanding was from discussions with</p>	<p>5421</p> <p>1 out what strata of prices it could reasonably charge 2 and how it might impact on its own sales, you would 3 do a variety of price changes, wouldn't you? 4 A. It depends on what the service is and, 5 you know, what the competitive structure of the 6 market and so on. 7 Q. You would expect, wouldn't you, different 8 reactions of respondents to perhaps a 25 cent 9 increase than a 1 dollar or 2 increase, depending 10 upon the overall price of the product? 11 A. Sure. I mean you expect that people will 12 respond differently to different levels of prices. 13 Q. Now, to get our terminology down, do you 14 agree that a confidence interval is in essence an 15 assurance that if you replicated the survey, you 16 would obtain essentially the same result within a 17 defined margin of error? 18 A. Could you repeat that? 19 Q. I can try. To get our terminology 20 correct, I want to make sure we're saying the same 21 thing to each other, do you agree that a confidence 22 interval is essentially an assurance that if you 23 replicated the survey, maybe 100 times, you would 24 obtain essentially the same result within a defined 25 margin of difference?</p>

<p style="text-align: right;">5422</p> <p>1 A. Well, the confidence interval is that 2 margin of difference. And it is generally expressed 3 as a probability that the result will be within that 4 confidence interval. 5 Q. But for this survey, you don't have a 6 confidence interval, do you? 7 A. Well, the survey doesn't have a 8 confidence interval. The survey -- a number in the 9 survey has a confidence interval around it, and so 10 for any number, since every number in the survey 11 basically has a different base size to it and it is 12 the base size that determines what the -- as well as 13 the magnitude of the number, determines what your 14 confidence interval is, every number in the survey 15 really has a different confidence interval around 16 it. 17 If we wanted to just look at the total 18 sample size of 2100 respondents, you could say that 19 you could have a confidence interval of plus or 20 minus 2 percentage points. But that would be only 21 the numbers that would be based on that particular 22 base size. 23 If the base size were half as large, the 24 confidence interval would be, you know, about 3 25 percentage points, slightly wider.</p>	<p style="text-align: right;">5424</p> <p>1 recently seen, surveys that are conducted in the 2 U.S. are non-probability samples, even those that 3 are, you know, sort of the gold standard, trying to 4 -- used in presidential election situations, are 5 really non-probability samples. 6 And so the confidence interval as was 7 expressed here is a little different than the kind 8 of confidence interval that is appropriate for a 9 probability sample. And for a probability sample, 10 you can say here is the likelihood that the true 11 result in the population is within plus or minus 2 12 percentage points. 13 And as was described to me by counsel 14 here, it was, if you conducted the survey over and 15 over again, you would get the same answer within 16 plus or minus some margin of error. 17 JUDGE STRICKLER: Thank you. 18 BY MR. ZAKARIN: 19 Q. Turn, if you would very quickly, to page 20 3 of your slides. And you were recounting here the 21 relevant factors in the Manual of Complex 22 Litigation, correct? 23 A. Correct. 24 Q. And the first one is population was 25 properly chosen and defined, correct?</p>
<p style="text-align: right;">5423</p> <p>1 Q. But you didn't do any testing to come up 2 with a confidence interval for any piece of this 3 survey or the whole survey, did you? 4 A. Well, it is not really a test. It is a 5 -- it is a very straightforward calculation that can 6 easily be done and depends on, again, what the 7 particular number is and what the magnitude of the 8 number is, as well as the base size. 9 Q. It could be easily done but you didn't do 10 it? 11 A. Well, it is really not appropriate to 12 express it as a confidence interval when -- for 13 surveys of this type. And I typically do not do it 14 when I present results of surveys. 15 JUDGE STRICKLER: When you say "surveys 16 of this type," you mean Internet surveys? 17 THE WITNESS: No, not just Internet 18 surveys, but any survey that is a non-probability 19 sample. 20 JUDGE STRICKLER: And an Internet survey 21 is an example of one of those? 22 THE WITNESS: An Internet survey is an 23 example. So are telephone surveys now that half the 24 households in the U.S. don't have a land line. So 25 98 percent of all surveys, the statistics I have</p>	<p style="text-align: right;">5425</p> <p>1 A. Correct. 2 Q. You didn't choose the population here, 3 did you? 4 A. No, I think I did. 5 Q. Wasn't the population chosen by the 6 Analysis Group? 7 A. No. 8 Q. Or, I'm sorry, research -- if I am not 9 mistaken, it is Research Now? Wasn't it their 10 population? 11 A. Well, that was the population from which 12 the sample was drawn, but the population that is 13 referred to in this first point is the items that I 14 mention in my presentation of, you know, men and 15 women, 18 and over who stream music and make -- and 16 participate in the decision as to which survey they 17 are going -- which service they are going to use. 18 Q. Now, in paragraph 19 of your witness 19 statement, your written rebuttal statement, that is, 20 which appears probably on page 5, do you see it? 21 A. Yes. 22 Q. You say that the proper universe for 23 willingness to pay for an unlimited catalogue music 24 streaming service is individuals who are currently 25 streaming music over the Internet, right?</p>

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<p style="text-align: right;">5426</p> <p>1 A. Correct.</p> <p>2 Q. And because of that, all of the people in</p> <p>3 your survey are already streaming; isn't that right?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. And isn't it a fact, therefore,</p> <p>6 that all of the respondents in the survey are</p> <p>7 already using an ad-supported free service, a full</p> <p>8 priced subscription service at a standardized price</p> <p>9 of \$9.99 a month, or a bundled service like Amazon</p> <p>10 Prime, which has zero cost to the consumer, other</p> <p>11 than the subscription fee?</p> <p>12 A. Yeah, I believe that's the defined</p> <p>13 universe.</p> <p>14 Q. In terms of the price sensitivity portion</p> <p>15 of the survey, it asks respondents who are already</p> <p>16 paying for streaming -- we will put to the side the</p> <p>17 ad-supported people for a second -- but it is asking</p> <p>18 respondents who are already paying for streaming</p> <p>19 whether they would be willing to pay 1 dollar or 2</p> <p>20 dollars more for streaming, other than if they opt</p> <p>21 for the single device Alexa, correct?</p> <p>22 A. Well that wasn't the -- a complete</p> <p>23 statement of what they were asked. They were</p> <p>24 actually doing four options; Amazon Music Unlimited</p> <p>25 at whatever price, Amazon Music Unlimited through a</p>	<p style="text-align: right;">5428</p> <p>1 Q. Is it your view that price sensitivity is</p> <p>2 unaffected by somebody's income level?</p> <p>3 A. I think that's an interesting hypothesis.</p> <p>4 I don't have any data to support it.</p> <p>5 Q. One way or the other?</p> <p>6 A. One way or the other.</p> <p>7 Q. But you are also aware that the</p> <p>8 respondents in this particular survey, what I want</p> <p>9 to look at is the invitation, which I think is</p> <p>10 Exhibit C-1, which I think is -- it is Appendix C,</p> <p>11 which I think is Exhibit 263. It will be in your</p> <p>12 large book. 263. Do you have that?</p> <p>13 A. 263, yes.</p> <p>14 Q. That's the eRewards that the company, the</p> <p>15 company that provides you with the survey</p> <p>16 respondents, provides you with members, right?</p> <p>17 A. Yes. eRewards was a name that Research</p> <p>18 Now used prior to changing its name to Research Now,</p> <p>19 but so the Panel members think of it as eRewards.</p> <p>20 Q. So you don't know what the income levels</p> <p>21 are of the people but we do know that the universe</p> <p>22 of their respondents seem to be interested in doing</p> <p>23 surveys, if they are selected, for \$2.50 in rewards,</p> <p>24 or 25 cents in rewards, if they are not selected; is</p> <p>25 that right?</p>
<p style="text-align: right;">5427</p> <p>1 single Alexa-enabled device, continuing with the</p> <p>2 current music streaming service or not using a music</p> <p>3 streaming service at all. So there were really four</p> <p>4 options. And the focus was really on the Amazon</p> <p>5 service.</p> <p>6 Q. But in certain cells you were asking</p> <p>7 people who were already paying \$9.99 to either be</p> <p>8 asked whether they were willing to pay \$10.99 or</p> <p>9 \$11.99 or to assume that they are already paying</p> <p>10 \$11.99, isn't that right, in certain of the cells?</p> <p>11 A. In certain of the cells, that's</p> <p>12 essentially correct. And that was done in order to</p> <p>13 provide sort of a complete picture so they could</p> <p>14 make an appropriate decision.</p> <p>15 Q. Now, isn't it true that asking people who</p> <p>16 are currently paying \$9.99 whether they would be</p> <p>17 willing to pay \$10.99 or \$11.99 to do the very same</p> <p>18 thing is likely to produce a negative response?</p> <p>19 A. And I said that in my deposition, and I</p> <p>20 want to make sure that the context of that is clear.</p> <p>21 Q. We will get to that. I promise you. In</p> <p>22 evaluating price sensitivity, you don't have any</p> <p>23 questions in your survey about the income levels of</p> <p>24 your respondents, do you?</p> <p>25 A. No, we didn't ask income levels.</p>	<p style="text-align: right;">5429</p> <p>1 MR. ELKIN: Objection, calls for</p> <p>2 speculation.</p> <p>3 JUDGE BARNETT: Overruled.</p> <p>4 THE WITNESS: And so \$2.50 is the normal,</p> <p>5 you know, reward for what is going to be a five- or</p> <p>6 ten-minute survey. The -- I think the motivation</p> <p>7 that people have for participating in market</p> <p>8 research surveys is to have their opinion reflected</p> <p>9 in the products and services that they are able to</p> <p>10 buy.</p> <p>11 The Market Research Association has had a</p> <p>12 long-standing campaign called Your Opinion Counts to</p> <p>13 encourage people to participate in market research</p> <p>14 surveys.</p> <p>15 And, you know, we have done surveys for</p> <p>16 among orthopaedic surgeons and among -- for women's</p> <p>17 shoes that cost 5- and 600 dollars. And these are</p> <p>18 appropriate types of rewards for, again, a few</p> <p>19 minutes of effort to have their opinion heard.</p> <p>20 BY MR. ZAKARIN:</p> <p>21 Q. You don't think that somebody who is</p> <p>22 willing to sit around and do a ten-minute survey and</p> <p>23 be part of a population that does surveys for a</p> <p>24 swift \$2.50, doesn't indicate anything about price</p> <p>25 sensitivity?</p>

<p style="text-align: right;">5430</p> <p>1 A. No, I don't think it does. And I think 2 that the way in which companies have used this type 3 of -- these types of surveys -- I mean, just you can 4 look at the Apple/Samsung case, which I think most 5 people are now familiar with, was an Internet survey 6 in which people got very modest compensation and 7 resulted in, you know, a multi-hundred million 8 dollar judgment based on the result of an Internet 9 survey. 10 And so, you know, you know, I think 11 everyone is price sensitive to some effect, some 12 degree or another. 13 Q. Okay. Mr. Klein, I am going to ask you 14 to try to answer my questions because we have 15 certain time constraints. 16 A. Okay. 17 Q. And I am trying to be quick and I am 18 trying to help you and everybody get out of here. 19 Now, in terms of -- you were told by -- 20 by counsel what services to include or at least to 21 name in your survey, correct? 22 A. No, I don't think we were told. But I 23 think we, you know, they reviewed the survey, and I 24 don't recall whether they made suggestions or not. 25 Q. Do you recall whether they told you to</p>	<p style="text-align: right;">5432</p> <p>1 errand? 2 A. And that's what I said in my -- in my 3 deposition. 4 Q. And was it true when you said it? 5 A. It was true within the context of a 6 direct question to respondents about what they would 7 do, you know, and to ask someone directly, you know, 8 would you be willing to pay more for the same 9 product is not an appropriate way to ask the 10 question. 11 And I don't think that's really what we 12 did in this situation. 13 Q. Well, you said this, that this is in your 14 experience, so your experience precedes this survey, 15 doesn't it? 16 A. Oh, yes. 17 Q. And you have done many surveys. And 18 based upon your experience you have concluded that 19 asking someone to pay more than they are currently 20 paying is a fool's errand? That's what you said, 21 isn't it? 22 A. As a direct question, yes. 23 Q. Is it also true that you said at your 24 deposition that you don't get valid responses to 25 such questions, and if you ask people if they will</p>
<p style="text-align: right;">5431</p> <p>1 include Pandora? 2 A. No, I don't think they told us to include 3 Pandora. I think that was our -- my expectation 4 would be that Pandora was a widely used free service 5 and would be an appropriate alternative to ask 6 people about. 7 Q. Were you aware that Pandora is not, at 8 least until March 15, pretty much, was a 9 non-interactive service? 10 A. Yes. 11 Q. You were aware? 12 A. Yes. 13 Q. Okay. 14 A. I mean, I use Pandora myself, so I know. 15 Q. Now, you excluded, as you have testified, 16 you excluded Amazon Music Unlimited from the price 17 sensitivity portion of the survey, correct? 18 A. That's correct. 19 Q. And isn't it a fact that in your 20 experience in conducting market research -- let me 21 try that again and let me withdraw it. 22 Isn't it a fact that in your experience 23 in conducting market research surveys that to ask 24 someone who is currently paying one price if they 25 would be willing to pay a higher price is a fool's</p>	<p style="text-align: right;">5433</p> <p>1 pay more without some other change in what they are 2 getting, it is not a question that would yield valid 3 data? 4 A. And I still agree with that, that a 5 straightforward question of would you be willing to 6 pay more isn't going to give you valid data. 7 Q. Now, despite your excluding Amazon Music 8 Unlimited music subscribers, because asking them if 9 they would be willing to pay more would be in your 10 words a fool's errand, your survey nevertheless 11 asked Spotify Free ad-supported service users if 12 they would be willing to pay much more than they are 13 currently paying for a service; isn't that true? 14 A. Could you -- Spotify ad-supported free? 15 Q. Yeah. 16 A. I am not sure I understand. 17 Q. People who use Spotify ad-supported 18 service pay nothing; isn't that right? 19 A. That's my understanding. 20 Q. Other than time they have to devote to 21 listening to a few ads? 22 A. That's correct. 23 Q. And you included them in your price 24 sensitivity survey, despite the fact that you are 25 asking them to pay considerably more than free;</p>

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<p>5434</p> <p>1 isn't that right?</p> <p>2 A. Right. That was my slide that showed</p> <p>3 that 80 or 85 percent of them wouldn't, wouldn't</p> <p>4 pay.</p> <p>5 Q. And did you expect that they would</p> <p>6 voluntarily say to you: I would be very happy to</p> <p>7 pay \$5.99 or \$11.99 for a service for which I am</p> <p>8 paying nothing now?</p> <p>9 A. We were asking them about the Amazon</p> <p>10 Music Unlimited service, so if they are not paying</p> <p>11 for a music streaming service now, the option of I</p> <p>12 would continue to pay for my current service, that</p> <p>13 wasn't offered to them. That wasn't one of the</p> <p>14 options that they would have seen.</p> <p>15 Q. It is also true, isn't it, that as part</p> <p>16 of your price sensitivity portion of the survey, you</p> <p>17 asked paid subscribers of Apple and Spotify</p> <p>18 subscription service and Pandora's non-interactive</p> <p>19 subscription -- let me back out Pandora.</p> <p>20 Apple's subscription service, Spotify's</p> <p>21 subscription service, Google Play Music service who</p> <p>22 are currently paying \$9.99 a month, you asked them</p> <p>23 whether they would be willing to pay \$10.99 or</p> <p>24 \$11.99 a month, depending upon what cell you put</p> <p>25 them in?</p> <p>5435</p> <p>1 A. Well, that was one of the options that</p> <p>2 they were given. But, again, the focus was on the</p> <p>3 Amazon Music Unlimited product. And in order to</p> <p>4 paint the full scenario, that was one of the</p> <p>5 alternatives that was out there, that the price of</p> <p>6 the other services would also have been higher.</p> <p>7 Q. But you didn't want to ask those</p> <p>8 questions for Amazon Music Unlimited subscribers,</p> <p>9 because that would not yield valid data asking them</p> <p>10 to pay more, but you consider it to be valid data to</p> <p>11 ask subscribers of Apple or Google Play or Spotify</p> <p>12 subscription whether they are willing to pay more?</p> <p>13 A. Well, I think it is a different</p> <p>14 situation. I mean, again, the direct questioning</p> <p>15 was about Amazon Music Unlimited. And the option of</p> <p>16 not choosing a -- to pay for a monthly streaming</p> <p>17 service was one of the four alternatives that was</p> <p>18 presented to them.</p> <p>19 But, again, the focus was on Amazon Music</p> <p>20 Unlimited, and I didn't feel that it would be useful</p> <p>21 data, valid data, to have those types of questions</p> <p>22 directed at current users of Amazon Music Unlimited.</p> <p>23 Q. But it was okay to ask those questions of</p> <p>24 current users of Apple or Spotify or Google Play</p> <p>25 Music?</p>	<p>5436</p> <p>1 A. As long as the focus --</p> <p>2 MR. ELKIN: Objection, asked and</p> <p>3 answered.</p> <p>4 JUDGE BARNETT: Sustained.</p> <p>5 BY MR. ZAKARIN:</p> <p>6 Q. Turn to paragraph 38 of your witness</p> <p>7 statement, of your rebuttal statement, please. Do</p> <p>8 you have it?</p> <p>9 A. Yes.</p> <p>10 Q. And here these are your track 1 and track</p> <p>11 2, track 1 being Prime members; track 2 being</p> <p>12 non-Prime members, correct?</p> <p>13 A. Correct.</p> <p>14 Q. And you break up both of them into</p> <p>15 separate cells. And cell 1 on Prime is the current</p> <p>16 pricing levels for Unlimited on Alexa portable</p> <p>17 devices and for other full price services, correct?</p> <p>18 A. Correct.</p> <p>19 Q. And cell 2 is the same thing, just one</p> <p>20 dollar more a month across the board?</p> <p>21 A. Correct.</p> <p>22 Q. And cell 3 is two dollars more across the</p> <p>23 board?</p> <p>24 A. Two dollars more off of cell 1, yes.</p> <p>25 Q. Correct. So cell 1 being the current</p>
<p>5435</p> <p>1 A. Well, that was one of the options that</p> <p>2 they were given. But, again, the focus was on the</p> <p>3 Amazon Music Unlimited product. And in order to</p> <p>4 paint the full scenario, that was one of the</p> <p>5 alternatives that was out there, that the price of</p> <p>6 the other services would also have been higher.</p> <p>7 Q. But you didn't want to ask those</p> <p>8 questions for Amazon Music Unlimited subscribers,</p> <p>9 because that would not yield valid data asking them</p> <p>10 to pay more, but you consider it to be valid data to</p> <p>11 ask subscribers of Apple or Google Play or Spotify</p> <p>12 subscription whether they are willing to pay more?</p> <p>13 A. Well, I think it is a different</p> <p>14 situation. I mean, again, the direct questioning</p> <p>15 was about Amazon Music Unlimited. And the option of</p> <p>16 not choosing a -- to pay for a monthly streaming</p> <p>17 service was one of the four alternatives that was</p> <p>18 presented to them.</p> <p>19 But, again, the focus was on Amazon Music</p> <p>20 Unlimited, and I didn't feel that it would be useful</p> <p>21 data, valid data, to have those types of questions</p> <p>22 directed at current users of Amazon Music Unlimited.</p> <p>23 Q. But it was okay to ask those questions of</p> <p>24 current users of Apple or Spotify or Google Play</p> <p>25 Music?</p>	<p>5437</p> <p>1 pricing; cell 3 being two dollars more in each</p> <p>2 instance?</p> <p>3 A. Right.</p> <p>4 Q. And looking at cell 3, if you would here,</p> <p>5 this is for Alexa, which you have listed at \$5.99 a</p> <p>6 month. Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. Now, these are Prime members. You are</p> <p>9 asking a Prime member if they would be willing to</p> <p>10 pay what is essentially a 50 percent jump in the</p> <p>11 normal price of \$3.99 when a Prime member</p> <p>12 undoubtedly knows what Alexa costs, isn't that true,</p> <p>13 an Alexa service? Let me rephrase it if I can.</p> <p>14 You are asking a Prime member whether</p> <p>15 they would be willing to pay essentially 50 percent</p> <p>16 more than the actual price for Unlimited on Alexa,</p> <p>17 aren't you?</p> <p>18 MR. ELKIN: Objection, assumes facts not</p> <p>19 in evidence, not 50 percent.</p> <p>20 JUDGE BARNETT: Overruled.</p> <p>21 BY MR. ZAKARIN:</p> <p>22 Q. Well, 2 dollars as compared to \$3.99 is</p> <p>23 pretty close to 50 percent. In fact, it is more</p> <p>24 than 50 percent.</p> <p>25 A. I mean, the prices that are offered are</p>

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<p>5438</p> <p>1 what they are. What the Prime member's awareness of 2 the price of or the current price of Amazon Music 3 Unlimited to a single Alexa-enabled device is, I 4 don't know. 5 Q. Well, do you assume that a Prime member 6 who presumably has been bombarded with information 7 by Amazon about this availability would be unaware 8 that they can get an Alexa device unlimited -- 9 unlimited music on an Alexa device for \$3.99 a 10 month? 11 A. Well, I don't know about everybody else, 12 but as a Prime member, I was unaware. I -- I don't 13 know how to answer your question. I mean, we didn't 14 ask that. 15 Q. You didn't test it? 16 A. We didn't ask that question. 17 Q. Okay. So you don't know what they knew 18 and you don't know what they are reacting to, 19 correct? 20 A. Well, I know that they are reacting to -- 21 Q. Other than the numbers? 22 A. They are reacting to the numbers that are 23 here. 24 Q. Let's look at Table 2, which is track 2 25 for non-Prime members. These are people who are not</p>	<p>5440</p> <p>1 A. Yes. 2 Q. And in cell 3 the choices are \$5.99 for a 3 device, \$9.99 and \$11.99, correct? 4 A. Correct. 5 Q. And you are asking these respondents, 6 because they have -- they already have a paying 7 service, correct? 8 A. Yes. 9 Q. They are already streaming and they are 10 paid streamers? 11 A. Yes. 12 Q. You are asking the people in this cell, 13 despite the fact that they are paying \$9.99 for a 14 service, to assume that they are paying \$11.99; is 15 that right? If you look in the body of this -- 16 A. Yes. 17 Q. -- you are asking them to make a non-real 18 world assumption, that they are actually paying 19 \$11.99, rather than what they are paying, correct? 20 A. Well, they are asked to assume that the 21 other services are priced at \$11.99. 22 Q. Don't they have to assume that they are 23 also paying \$11.99? 24 A. Yes. 25 Q. When they know that they are paying</p>
<p>5439</p> <p>1 members of Prime, correct? 2 A. Correct. 3 Q. And you have cells 4, 5, and 6, and 4 essentially these, the middle column doesn't have 5 the discount for Prime membership. 6 A. That's correct. 7 Q. In Exhibit 264, which I think is -- it 8 may be easier for you to look at page D-12, which is 9 Exhibit 264, but it is attached to your written 10 statement as well. 11 A. Okay. It is the screen shots? 12 Q. It is the screen shot. 13 A. Okay. 14 Q. And this is Q-4 A/B. And if I am 15 understanding, this is somebody -- this is for a 16 Prime member who does not own an Alexa-enabled 17 device and is currently paying for a music streaming 18 service and they are in cell 3? 19 A. Yes. And this was the slide that was 20 shown earlier, yes. 21 Q. And this is somebody who is currently 22 paying for a music streaming service, correct? 23 A. Yes. 24 Q. They are a Prime member and they are 25 paying for a service?</p>	<p>5441</p> <p>1 \$9.99? 2 A. Okay. 3 Q. Do you think that asking somebody who is 4 paying \$9.99 to pretend that they are actually 5 paying \$11.99 is a realistic question? 6 A. Well, I think that in creating scenarios 7 in which you are asking people to make predictions 8 about what they are going to do in the future, you 9 need to sort of lay out the situation in which they 10 are currently in and telling someone that, you know, 11 that the price is \$11.99 and what are you going to 12 do is not an unreasonable way to frame the scenario. 13 Q. Turn to paragraph 46, if you would. This 14 is in Exhibit 249. Now, here you are asking 15 questions of people who are in track 2 as opposed to 16 track 1, correct? 17 A. Wait, I'm sorry. 18 Q. I'm sorry, paragraph 46. 19 A. Paragraph 46, right. 20 Q. Yes? 21 A. Okay. 22 Q. Am I correct that here you are dealing 23 with people who are not Prime members and so you are 24 into cells 4, 5 and 6 and track 2? 25 A. Right.</p>

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<p>5442</p> <p>1 Q. And these are people who do not have 2 Unlimited and they are not Prime members? 3 A. Right. 4 Q. And you assign to people cells 4 through 5 6, and here again using the jumps of 1 dollar and 2 6 dollars, correct? 7 A. Correct. 8 Q. Okay. And I want you to turn to page 9 D-14, which is in Exhibit 264. Again, this is 10 another screen shot. 11 A. I'm sorry, what was the -- 12 Q. I think it is D-14. It may make it 13 easier for you to find. 14 A. Okay. 15 Q. The pages are hopefully numbered. 16 A. Yes. 17 Q. And this is a screen shot on questions 5 18 A/B. And this is a screen shot for somebody who 19 identified themselves as someone who owns an 20 Alexa-enabled device, is not currently paying for 21 music streaming service, and now you have put them 22 in cell 5, right? 23 A. Yes. 24 Q. That just happens -- there are different 25 screen shots. This just happens to be the one that</p>	<p>5444</p> <p>1 a considerable jump, not one dollar or two dollars, 2 over what the people who are streaming for free on 3 an ad-supported service is? 4 A. Oh, yes, which is why so few people chose 5 one of those paying options. 6 Q. So it is not that surprising that when 7 you ask somebody who is doing something for far less 8 money, would they be willing to pay a lot more 9 money, they might say no to you? 10 A. They might. But in this case they have 11 also got an option of getting into the market with a 12 device they already own for a lot less money than if 13 they are aware of what current pricing is, all at 14 \$4.99. 15 Q. These are people who already own an Alexa 16 device, right? 17 A. Right. 18 Q. So they can stream already from Spotify 19 or Pandora to their Alexa device. They don't need 20 to pay \$4.99 for that service, do they? 21 A. For the -- right, that's correct. They 22 don't need to pay -- they don't need to sign up for 23 Amazon Prime, Amazon Music Unlimited, right. 24 Q. They don't have to pay \$4.99 to do it 25 through an Alexa device what they are already doing</p>
<p>5443</p> <p>1 you used to illustrate. 2 A. That's correct. 3 Q. So this is someone who is streaming and 4 they are streaming for free, so it has to be an 5 ad-supported service, correct? They are not Prime 6 members, so it can't be Prime Music. 7 A. Right. 8 Q. And the choices that you offer these 9 people who have been streaming for free are solely 10 paying, if I have it right in looking at Table 2, 11 \$5.99, \$10.99, or \$11.99 a month; isn't that 12 correct? 13 A. Well, no. 14 Q. These are people in cell 5, I believe, 15 which is what this screen shot is. 16 A. Right, \$4.99 and \$10.99. 17 Q. Do I have it wrong? I misspoke. You are 18 right, it is cell 5, not cell 6. I apologize. 19 A. Right. 20 Q. Cell 5 is the middle cell? 21 A. Right. 22 Q. So it is \$4.99, \$9.99 and \$10.99? 23 A. Yes, \$4.99, \$10.99 and \$10.99. 24 Q. Oh, \$10.99, correct. And so you would 25 agree, wouldn't you, that paying \$4.99 or \$10.99 is</p>	<p>5445</p> <p>1 for free, correct? 2 A. I believe that's correct, yes. 3 Q. Okay. Would you admit that placing 4 people in these cells, these specific cells, which I 5 liken to silos, tells you that somebody might not be 6 willing to pay 2 dollars in terms of an increase, 7 but does that tell you for that person whether or 8 not they might be willing to pay 1 dollar or some 9 lesser number? 10 A. Well, since the assignment is at random 11 to one of these three cells, the expectation is that 12 we have kind of the same people, the same types of 13 people in cells 1, 2, and 3 and in cells 4, 5, and 14 6. And so, sure, someone who is -- who wouldn't be 15 willing to pay 2 dollars is -- might be willing to 16 pay 1 dollar, but similarly someone who is willing 17 to pay 1 dollar might also be willing to pay 2 18 dollars. I mean, it is -- that's kind of how an 19 experimental design let's you identify what these 20 responses really are. 21 Q. And somebody willing to pay 50 cents 22 might not be willing to pay a dollar, correct? 23 A. And vice versa. Someone who is willing 24 to pay 50 cents might also be willing to pay a 25 dollar.</p>

<p style="text-align: right;">5446</p> <p>1 Q. They might be, but we don't know about 2 the 50 cents because you discarded your pretest? 3 A. Well, we didn't -- we didn't collect, you 4 know, an appropriate sample of data to draw any 5 conclusions about the -- about those other price 6 increases. 7 Q. Turn to paragraph 61. 8 MR. ZAKARIN: And, Your Honor, I may now 9 start, given that we're into the conclusions, I 10 don't want to unwittingly step on anything that 11 might be restricted. I could easily do that. 12 JUDGE BARNETT: Wow. This is a perfect 13 time then for us to take our afternoon recess, which 14 we will do. And when we reconvene, it will be in 15 closed session. 16 (A recess was taken at 3:22 p.m., after 17 which the hearing resumed at 3:49 p.m.) 18 JUDGE BARNETT: Please be seated. I'm 19 beginning to feel like I'm living under an 20 avalanche, that there is an avalanche danger here. 21 Mr. Zakarin? Okay. We're in closed session. 22 (Whereupon, the trial proceeded in 23 confidential session.) 24 25</p>	<p style="text-align: right;">5463</p> <p>1 And so when you are trying to tease out 2 an answer like that, you generally come at it in a 3 more indirect kind of way with tradeoff analysis and 4 changing multiple features of the product at issue. 5 And so when I made the statement about 6 the fool's errand, it was if I were to ask someone 7 who's, you know, just paid a dollar for a bottle of 8 water, if they would be willing to pay 2 dollars for 9 it, and if it is in a survey setting they are going 10 to think: What's this all about? And it gets into, 11 again, the double-blind question of how is the data 12 going to be used. 13 If they think it is going to be used in 14 order to increase the price they are paying, they 15 are not going to give you a reasonable answer. 16 JUDGE STRICKLER: I know you said it, but 17 I am not recalling it now. 18 And how did you avoid that fool's errand 19 in your -- do a work-around in your survey 20 questions? 21 THE WITNESS: Okay. So in our survey 22 questions, we were focused on the Amazon Unlimited 23 service. And we asked about that at various price 24 points. 25 And in order to complete the scenario of,</p>
<p style="text-align: right;">5462</p> <p>1 O P E N S E S S I O N 2 R E D I R E C T E X A M I N A T I O N 3 BY MR. ELKIN: 4 Q. Hi there, Mr. Klein. 5 A. Hi. 6 Q. Still at it. Now during your 7 cross-examination Mr. Zakarin asked you about your 8 statement that you made in your deposition that in 9 your experience in conducting market research 10 surveys, that ask someone who is currently paying 11 one price if they would be willing to pay a higher 12 price, is a fool's errand and is not a question that 13 would yield valid data. 14 Do you remember that? 15 A. Yes, I do. 16 Q. In what context of those statements were 17 you making that? 18 A. So I was making that in the context of 19 asking a direct question of users of a particular 20 service if they would be willing to pay more. And 21 what happens in a survey setting is that, you know, 22 respondents will often try and figure it out. And, 23 you know, are they really trying to understand 24 whether they can charge me more for the service I 25 have got?</p>	<p style="text-align: right;">5464</p> <p>1 you know, what's the market and what's the 2 environment within which these, they should be 3 evaluating these prices, we had them assume that the 4 price of these other services was going to increase 5 as well. 6 And so then one of the options that they 7 had was, well, wait a second, I am not going to buy 8 anything, but the focus was on the Amazon product 9 and whether or not they would purchase that at the 10 price specified. And so I believe that we have kind 11 of avoided the figure-it-out activity that a 12 respondent would go through in addressing that 13 question. 14 JUDGE STRICKLER: Because you raised the 15 proposed price for all the competing services? 16 THE WITNESS: Right, yes. 17 JUDGE STRICKLER: Thank you. 18 BY MR. ELKIN: 19 Q. So that's with -- the concerns that you 20 just discussed were with respect to the price 21 sensitivity related to AMU. Are you concerned that 22 the same would be true of the price sensitivity 23 question if your survey put to non-Amazon Music 24 Unlimited subscribers? 25 A. Well, no. I think we -- the questions</p>

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<p style="text-align: right;">5465</p> <p>1 asked of the non-Amazon Music Unlimited subscribers 2 was, was are they going to buy something that they 3 are not currently buying? So I don't have that 4 concern. 5 Q. Okay. 6 MR. ELKIN: I have no further questions. 7 MR. ZAKARIN: I have nothing. 8 JUDGE BARNETT: Thank you, Mr. Klein. 9 You may be excused. 10 THE WITNESS: Thank you. 11 JUDGE BARNETT: Mr. Steinthal? 12 MR. STEINTHAL: A couple of 13 scheduling/housekeeping issues. I have been 14 nominated to address the Panel with the following. 15 First of all, if we're going to do 16 everything has to be done six weeks after the close 17 of the hearing, as we heard you loud and clear, the 18 general consensus is that we would like to put in 19 the original findings and conclusions of law on May 20 4th, which would be four weeks after. 21 MR. ZAKARIN: I'm sorry -- 22 MR. STEINTHAL: Sorry, May 11th. 23 JUDGE BARNETT: I was going to say May 24 4th, that's what we said. 25 MR. STEINTHAL: May 11 and May 25th would</p>	<p style="text-align: right;">5467</p> <p>1 prepare our next few days, we would like to get a 2 sense of whether the Panel would permit closings 3 after the briefing rather than next Thursday. 4 MS. MAZZELLO: Quickly on behalf of 5 Apple, our position is that it should go forward 6 next week. We think it is more useful to do that 7 type of summation immediately after trial when the 8 evidence is fresh in our minds. That's how it is 9 typically done, but we don't want it to drag out too 10 long. 11 MR. ZAKARIN: If I can on that, we 12 obviously concur with Mr. Steinthal. We think, and 13 obviously it is your schedule, but we think that 14 after we put the briefs in, and we have collected 15 all the evidence, identified it, it would be more 16 effective than in effect an hour or something 17 argument immediately after trial before we have all 18 had a chance to go through everything, put it 19 together, and it could be targeted. 20 And I think that the Panel would be more 21 informed and probably would be able to fire more -- 22 you have been very good at doing that so far -- but 23 firing for questions at both sides. And contrary to 24 what Mary said, at least in my experience and 25 probably the other counsel, when you have a bench</p>
<p style="text-align: right;">5466</p> <p>1 be two weeks after that, with the Panel's approval. 2 And I think the Copyright Owners were going to check 3 back. They originally raised this, but that's the 4 inclination of all the Services and I think the 5 Copyright Owners would agree. So that would be May 6 11, May 25. 7 JUDGE BARNETT: That would be fine. We 8 will be right here. And the only thing is we want 9 them all in by the time we leave here. 10 MR. STEINTHAL: One more issue, and I 11 speak on behalf of all the Services, save Apple on 12 this one, and the Copyright Owners -- 13 JUDGE STRICKLER: You mean save the 14 Copyright Owners? 15 MR. STEINTHAL: Except for. All but 16 Apple. 17 JUDGE STRICKLER: I didn't know where the 18 comma was in your sentence. 19 MR. STEINTHAL: We would, if the Panel 20 would indulge, prefer to have closings after all the 21 papers are in on a date convenient for the Panel. 22 And Apple has a concern about that. But 23 before we took it further, we wanted to raise it. 24 And obviously you had initially set us for closings 25 on Thursday of next week, so we would like, as we</p>	<p style="text-align: right;">5468</p> <p>1 trial and you have a closing argument, it usually, 2 at least in my experience, has been after it has 3 been briefed so the Court is hot. But that's our 4 suggestion, in any event. We concur with the 5 Services on that, one of the few times. 6 JUDGE BARNETT: Well, you might have 7 noticed that we combined direct and rebuttal cases, 8 which was already a change from what our regs imply 9 and a change from prior practice. 10 And in a more recent determination 11 proceeding, we have held closings after we received 12 the proposed findings and conclusions. 13 I will have to consult with my 14 colleagues. It is a tough call only because of our 15 current schedule. If it weren't for the fact that 16 we have this other matter just barreling down on us, 17 it would be a no-brainer for me, at least, and I 18 think we would all prefer to have you have the time 19 to organize your thoughts so that we get it in as 20 organized and concise a way as possible, but I can't 21 make that call at this point. So we will let you 22 know first thing in the morning, so you can plan 23 around that. 24 MR. ZAKARIN: If it makes a difference in 25 the conference of your thinking, it is my birthday</p>

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5469					5471				
1	today, and it would be a nice birthday present if	1	EXHIBIT NO:	MARKED/RECEIVED	REJECTED				
2	you would be willing to do that.	2	PANDORA						
3	JUDGE BARNETT: Shall we sing?	3	1030	5325					
4	(Laughter)	4	1038	5310					
5	MR. ZAKARIN: No. Please. Not after	5	1041	5308					
6	this many years.	6	1062	5290					
7	JUDGE BARNETT: Mere child, mere child.	7	1068	5291					
8	Are we having another witness today?	8							
9	MR. MANCINI: No, Your Honor. The next	9							
10	witness is Dr. Leslie Marx in rebuttal. And she is	10							
11	arriving here -- she will be the first witness	11							
12	tomorrow morning.	12							
13	JUDGE BARNETT: We will see you then 9:00	13							
14	o'clock in the morning. Thank you.	14							
15	(Whereupon, at 4:17 p.m., the hearing	15							
16	recessed, to reconvene at 9:00 a.m. on Friday, April	16							
17	7, 2017.)	17							
18		18							
19		19							
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24		24							
25		25							
5470					5472				
1	C O N T E N T S	1	CERTIFICATE						
2	WITNESS DIRECT CROSS REDIRECT RECROSS	2							
3	GREGORY LEONARD	3	I certify that the foregoing is a true and						
4		4	accurate transcript, to the best of my skill and						
5	PAUL VOGEL	5	ability, from my stenographic notes of this						
6	5288 5329 5360	6	proceeding.						
7	ROBERT KLEIN	7							
8	5366 5409 5462	8							
9		9	4/10/17 Karen Brynteson						
10	AFTERNOON SESSION: 5360	10	Date Signature of the Court Reporter						
11		11							
12	CONFIDENTIAL SESSIONS: 5221-5227	12							
13	5293-5359, 5396-5408, 5447-5461	13							
14		14							
15	E X H I B I T S	15							
16	EXHIBIT NO: MARKED/RECEIVED REJECTED	16							
17	AMAZON	17							
18	249 5372	18							
19	250 5406	19							
20	251 through 262 5405	20							
21	263 5406	21							
22	264 5406	22							
23	265 5406	23							
24	266 5406	24							
25	267 5406	25							

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<p>\$</p> <p>\$1.04 [3] 285:25 286:11,19</p> <hr/> <p>0</p> <p>0007 [3] 284:14,20 286:15</p> <p>0009 [1] 283:22</p> <p>0015 [5] 282:17 285:10,22 286:5,15</p> <hr/> <p>1</p> <p>1 [26] 43:7,7,15 44:8 47:15 64:2 66:8,12 72:20,24 75:15 76:8 77:6 97:25 98:23,25 262:11 269:23,25 271:12 272:15 276:6 284:10 287:7,10 288:7</p> <p>1-to-1 [2] 266:5,6</p> <p>1.1 [1] 66:7</p> <p>1.2 [2] 98:23,25</p> <p>10 [4] 261:16 269:24 271:11 275:16</p> <p>10.5 [2] 288:23 289:19</p> <p>10:26 [1] 60:24</p> <p>10:32 [1] 60:25</p> <p>100 [7] 40:12 42:8,9 44:14 272:18 273:3 274:1</p> <p>100/zero [2] 59:1,11</p> <p>10020 [1] 4:7</p> <p>10022 [1] 2:25</p> <p>10036 [1] 2:15</p> <p>101 [2] 1:18 5:21</p> <p>10153-0119 [1] 3:15</p> <p>10166 [1] 5:11</p> <p>1034 [1] 311:11</p> <p>11 [2] 36:20 261:17</p> <p>112 [6] 238:20,25 239:9,10,21,22</p> <p>114 [1] 227:2</p> <p>115 [6] 162:24 226:25 227:2,2 261:25 269:5,5 288:19</p> <p>12 [4] 46:24 47:9 98:8 239:20</p> <p>12-month [1] 47:8</p> <p>12.6 [1] 66:11</p> <p>1221 [1] 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